

1 IN THE UNITED STATES DISTRICT COURT
2 FOR THE NORTHERN DISTRICT OF OKLAHOMA

3

4 UNITED STATES OF AMERICA,)
)
5 Plaintiff,)
)
6 V.) No. 03-CR-43-H
)
7 QUINTON PHILLIP SHRECK,)
)
8 Defendant.)

9

10

11

12 REPORTER'S TRANSCRIPT OF PROCEEDINGS

13 HAD ON APRIL 15, 2004

14 EVIDENTIARY HEARING

15

16

17 BEFORE THE HONORABLE SVEN ERIK HOLMES, Chief Judge

18

19 APPEARANCES:

20 For the Plaintiff: Mr. Chad A. Greer
 Ms. Susan Morgan
21 Assistant United States Attorney
 3460 United States Courthouse
22 Tulsa, Oklahoma 74103

23

24 For the Defendant: Mr. Allen B. Smallwood
 Attorney at Law
 1310 South Denver
25 Tulsa, Oklahoma

Glen R. Dorrough
UNITED STATES COURT REPORTER

1 (APPEARANCES CONTINUED)

2 For the Defendant: Mr. William G. LaSorsa
3 Jones, Givens, Gotcher & Bogan, P.C.
4 15 East 5th Street, Suite 3800
5 Tulsa, Oklahoma 74103

6 - - - - -

7 CONTENTS

8 Page No.

9 WITNESSES CALLED ON BEHALF OF DEFENDANT:

10 DONALD HOLLOWAY

11 Direct Examination by Mr. Smallwood.....4

12 Cross-Examination by Mr. Greer.....21

13 Redirect Examination by Mr. Smallwood.....25

14 DEAN BOLAND

15 Direct Examination by Mr. Smallwood.....32

16 Cross-Examination by Mr. Greer.....98

17 Redirect Examination by Mr. Smallwood.....115

18 Recross-Examination by Mr. Greer.....117

19 DONALD HOLLOWAY (Called by the Court)

20 Examination by the Court.....121

21 Cross-Examination by Mr. Smallwood.....129

22 Cross-Examination by Mr. Greer.....130

23 Recross-Examination by Mr. Smallwood.....132

24 ARGUMENT:

25 By Mr. Smallwood.....145

By Mr. Greer.....151

1 PROCEEDINGS

2 April 15, 2004

3 THE COURT: Please be seated. The Court calls the
4 case of United States vs. Quinton Shreck. Could counsel please
5 identify themselves for the record.

6 MR. GREER: Your Honor, Chad Greer and Susan Morgan on
7 behalf of the United States.

8 THE COURT: All right.

9 MR. SMALLWOOD: Allen Smallwood and William LaSorsa on
10 behalf of Mr. Shreck who is personally present as well, Your
11 Honor.

12 THE COURT: All right, in your judgment, Mr. Greer, on
13 behalf of the United States, how best should we proceed here
14 today?

15 MR. GREER: Your Honor, I think probably the best way
16 to proceed would be to allow the parties to argue as to the
17 vagueness or overbreadth the doctrine and if that leads to the
18 testimony of Mr. Boland and cross-examination of such
19 testimony, then I think that might be the best way to proceed.

20 THE COURT: All right. Should we proceed with the
21 evidence first and then based on that evidence we will go to
22 argument?

23 MR. GREER: Your, Honor, that is fine with the
24 Government.

25 THE COURT: All right. Mr. Smallwood, does that make

1 sense to you, sir?

2 MR. SMALLWOOD: That's what I anticipated, Your Honor.

3 THE COURT: All right. In that case you are
4 recognized, Mr. Smallwood. You may proceed.

5 MR. SMALLWOOD: Judge we would call Detective Donald
6 Holloway.

7 THE COURT: All right. Would the witness please come
8 forward and be sworn.

9 DONALD HOLLOWAY

10 Called as a witness on behalf of the defendant, being first
11 duly sworn, testified as follows:

12 DIRECT EXAMINATION

13 BY MR. SMALLWOOD:

14 Q. State your name and occupation for the record please?

15 A. Donald Holloway. I'm a police officer for the City of
16 Tulsa.

17 Q. Pardon me, sir, I didn't hear you?

18 A. Donald Holloway, I'm a police officer with City of Tulsa.

19 Q. And how long have you been employed as a police officer
20 for the City of Tulsa?

21 A. 14 years.

22 Q. What is your educational background?

23 A. I attended the University of Oklahoma and also Central
24 State University in Edmond, and I've attended a lot of law
25 enforcement through the police academy here in Tulsa and

1 graduated that in 1989.

2 Q. Since you've been a law enforcement officer, what areas of
3 law enforcement have you been involved with?

4 A. I worked patrol divisions for the first five years. After
5 that I went misdemeanor investigations working out of the
6 Uniform Division Southwest, I did it that for two years, then
7 went and worked fraud/forgery for six months and then went to
8 our sex crime crimes unit and worked in that unit as a
9 detective for five years and for the last three years I have
10 been assigned to cyber crimes unit.

11 Q. Cyber crime unit?

12 A. Yes.

13 Q. That's basically crimes dealing with computers, the
14 internet and that sort of thing?

15 A. Yes, sir.

16 Q. Have you focused on any particular area of crimes
17 involving computer technology?

18 A. My area that I work is crimes against people, which would
19 involve threats, harassing e-mails, child pornography and sex
20 crimes against children on the internet.

21 Q. What about fraud on the internet?

22 A. I do work some of that, but my main area of focus is what
23 we call victim crimes which are the crimes I said.

24 Q. Do you have any degree in computer science?

25 A. No, I do not.

1 Q. What is the nature of your education or training in area
2 of computer technology?

3 A. I attended the National White Collar Crime Commission's
4 basic data recovery and analysis course.

5 Q. When was that?

6 A. It would have been in 2000 and -- I believe in 2000.

7 Q. In 2000?

8 A. Yes.

9 Q. And was that your first focused computer technology
10 educational course?

11 A. Yes, it was.

12 Q. Okay. Continue please.

13 A. I've also attended the Oklahoma Council on Law Enforcement
14 Education and Training basic computer investigations course and
15 that was in, I believe also 2000. I've also attended numerous
16 seminars in the last three years dealing with computer crimes
17 and I've worked with the High Tech Crime Investigators
18 Association, the Oklahoma Chapter, and we have monthly meetings
19 with other computer crimes investigators around the state and
20 talk about computer forensics.

21 Q. How many investigation have you been involved in that
22 dealt specifically with alleged child pornography?

23 A. I'd say in the last eight years probably around a 150.

24 Q. 150?

25 A. Yes.

1 Q. Have you ever been, with your educational and training
2 background, have you ever taught any courses in computer
3 technology?

4 A. No.

5 Q. Have you ever taught any courses that in any way deal with
6 visual or digital imaging in reference to computer technology
7 or the internet?

8 A. No.

9 Q. Have you taken any courses that specifically deals with
10 digital or visual imaging, and the internet specifically with
11 reference or focusing on alleged child pornography?

12 A. Yes, most of the classes that I attended dealt with that
13 type of topic as far as the digital images of child
14 pornography.

15 Q. And how many hours, I know you can't tell be exactly, but
16 how many hours of instruction would you have had that dealt
17 specifically with the area of digital or digital imaging
18 focusing on child pornography?

19 A. It's hard to estimate. I'd say probably around two or
20 three hundred hours.

21 Q. But you've never taught any courses in that regard?

22 A. No, sir.

23 Q. Were you one of the investigating officers in this case?

24 A. Yes I was.

25 Q. There is a companion state case in Rogers County, is there

1 not?

2 A. Yes, there is.

3 Q. Were you also involved in that investigation?

4 A. Yes.

5 Q. Will you tell the Court what you did regarding your

6 investigation as it pertains to this case?

7 A. I was contacted by investigator Deborah Beatty with the

8 Rogers County Sheriff's Office. She advised me that they had

9 seized several computers in relation to a case that they were

10 investigating. And she requested that I conduct a forensic

11 examinations on the computers and other computer media that

12 they had recovered.

13 Q. And when you reference conducting a forensic examination

14 on computers, have you had any training on how to do that?

15 A. Yes, I have.

16 Q. Why would you need to have training in how to conduct a

17 forensic investigation on computer information?

18 A. It's an area that you have to have training and experience

19 in. You have to go through the training to get the expertise

20 and know how the computer software that you use works, how to

21 properly take apart a computer to retrieve the hard drive and

22 then how to recover the information off of that, as well as

23 other media, like floppy disks or CD-ROMs.

24 Q. Why is it important to know the appropriate technique to

25 obtain information from software, floppy disks or hard drives

1 off computers?

2 A. So you don't damage or alter the media that you're working
3 on.

4 Q. And so it's your testimony that a person ignorant of the
5 appropriate technique, in attempting to investigate a computer,
6 or hard drive, or floppy disk, or software, could damage that
7 or alter that inadvertently?

8 A. Yes, you could.

9 Q. And how much training have you had in how to conduct those
10 investigations regarding retrieving that type of information?

11 A. It's the training that I listed earlier, the National
12 White Collar Crime Commission as well as the CLEETS class that
13 they offered and the ongoing job training. I've attended a
14 software seminar for Encase. I went through the training unit
15 on that, how to use that software.

16 Q. And where did you conduct this forensic investigation of
17 the computers involved in this case?

18 A. At our office here in Tulsa.

19 Q. The Tulsa Police Department?

20 A. The cyber crimes unit which is actually housed on TU, it's
21 not at the downtown police station.

22 Q. You were not involved in the actual seizure of these
23 computers from Rogers County?

24 A. No, I wasn't.

25 Q. You were not involved in any investigation or examination

1 of those computers that might have occurred in Rogers County?

2 A. Did I do any of the examination in Rogers County, is that
3 what you're asking me?

4 Q. Yes.

5 A. No, I didn't.

6 Q. Do you know what was done there when those computers were
7 seized by some other law enforcement officer?

8 A. They were seized, put in their property room and then
9 delivered to me.

10 Q. Do you have any information that any type of forensic
11 investigation was conducted on the computers or any of their
12 attendant hard drive or software there in Rogers County by
13 someone other than you?

14 A. No.

15 Q. When you first saw these computers or this technology, was
16 there anything about it which would lead you to believe that
17 anybody else had conducted any kind of investigation of those
18 items?

19 A. No, I didn't see anything like that.

20 Q. What would you expect to see if that had occurred?

21 A. The boxes would have possibly been open, the hard drives,
22 you can tell by the dust and the ways the screws are inside the
23 box, when the hard drives are moved you can usually tell if
24 that's been disturbed in any way. That's what you look for.

25 Q. If a person completely ignorant of the technology, such as

1 me, were told to go to this location and seize these computers,
2 what could I do inadvertently to damage the integrity of the
3 images or the information contained?

4 A. Turn it on.

5 Q. Turn it on?

6 A. Yes.

7 Q. Merely turning it on?

8 A. Yes. That could start altering dates.

9 Q. And you don't know if it was turned on there or not do
10 you?

11 A. I do not.

12 Q. Was there anything about your investigation which would
13 lead you to believe that it had been turned on, as you describe
14 it, there at the scene by someone other than you?

15 A. No.

16 Q. Would there be any record made of that so that you could
17 have detected that?

18 A. Yes, based on the images we recovered you would have seen,
19 possibly seen dates changed, dates and times changed, that the
20 dates were after the seizure, that the date that the file was
21 accessed would have been after the seizure and, that would have
22 let you know that something happened, and I did not see
23 anything like that.

24 Q. Is there a general protocol to follow when you conduct
25 your forensic investigation that would apply to all computer

1 hardware or software?

2 A. There's guidelines. Given certain circumstances you may
3 have to go outside those guideline parameters, but pretty much
4 it's a straightforward guideline that you follow.

5 Q. Was there anything about these particular computers that
6 you saw which would cause you to have any concern about
7 conducting an investigation outside those guidelines?

8 A. No.

9 Q. And would you briefly describe what those guidelines are
10 in the sense of telling us also how you conducted this
11 investigation? What you did, tell us what you did?

12 A. If we're dealing with a computer hard drive, first you
13 remove the hard drive from the computer. We use what is called
14 Encase software to make an image of the hard drive, and that
15 image is just a carbon copy of the actual hard drive. It's
16 sector-by-sector of the hard drive.

17 Q. And have you had specific training on how to do that?

18 A. Yes, I have.

19 Q. And you follow the protocol that you have been taught when
20 doing that?

21 A. Yes.

22 Q. Okay. What next did you do?

23 A. After the image is completed we put the original evidence
24 back inside the original suspect computer and then we work off
25 the image that we made and that's where we do our examination

1 on. That way we do not alter the original evidence in any way.

2 Q. So at this point in the investigation, after you have

3 removed the hard drive and you said copied it?

4 A. Yes.

5 Q. Is copy a correct technical term?

6 A. It's what, we call a mirror image but --

7 Q. As opposed to copy?

8 A. Yes, it's just general terms. It's a copy, I mean it's an

9 exact sector-by-sector copy of that original hard drive.

10 Q. Okay. But the jargon is to refer to that as a mirror

11 image?

12 A. Yes.

13 Q. And you did so?

14 A. Yes.

15 Q. Returned the original hard drive to the computer?

16 A. Yes.

17 Q. At that point in time had you viewed any of the images on

18 the hard drive?

19 A. No.

20 Q. What did you do next?

21 A. We take the image that we made, put that into our forensic

22 machine. We use Encase to go through the hard drive and look

23 at the files.

24 Q. Pardon me, you said Encase?

25 A. Yes, E-N-C-A-S-E.

1 Q. And that describes a particular technique or...

2 A. That's a software program. It's a forensic software
3 program.

4 Q. And that description Encase is generally accepted
5 throughout the industry?

6 A. Yes.

7 Q. Okay. So if I talking to a Philadelphia detective he
8 would know, with your expertise, he would know what Encase
9 software was?

10 A. He should. And there's other software that you can use,
11 but Encase is pretty well nationally recognized.

12 Q. Okay. What did you do next?

13 A. You look at files and folders that are contained on that
14 hard drive.

15 Q. And did you do that?

16 A. Yes.

17 Q. How long did that take?

18 A. The number of computers and the floppy disks as well as
19 other media we had, it took approximately two or three weeks.
20 It takes a long time.

21 Q. Two or three weeks?

22 A. Yes.

23 Q. And I know -- I'm not going to hold you to an exact
24 number, Detective Holloway, but can you tell us about how many
25 total images you saw on this hard drive?

1 A. Are you talking all images all totaled?

2 Q. Yes, sir.

3 A. As far as image files of pictures, there's usually
4 anywhere from 50 to 75,000 pictures per hard drive depending on
5 the size of the hard drive and what's on it, but it's 500,000
6 or more probably on all of the media together.

7 Q. And to the best of your memory, you at least glanced at
8 all of those?

9 A. Yes.

10 Q. And what percentage of that, using you figure, half a
11 million you say, 500,000, what percentage of that would have,
12 in your opinion, contained what you have described as possible
13 child pornography in your opinion?

14 A. I don't have an exact number off the top of my head but I
15 would say probably around 500 to 750. Just an estimate.

16 Q. 500 to 750?

17 A. Yes.

18 Q. I'm not real good at decimals but that's far less than one
19 percent of the total, isn't it?

20 A. I would guess, yes.

21 Q. Okay. Through some of the discovery documents, Detective
22 Holloway, you refer uniformly to these images that you have
23 referenced these 500 to 750 images, as possibly child
24 pornography or appeared to be child pornography. You qualified
25 that somewhat. Why do you do that?

1 A. Just based on my -- what I have seen. If I don't know
2 that this photo is part of a series that's been identified I
3 will call it possible or apparent child pornography.

4 Q. Why do you refer to it that way?

5 A. Just you look at the image. To me it looks like it's a
6 minor under 18. To me that's apparent child pornography.

7 Q. Of course you don't know exactly, based upon your training
8 and experience, you don't know exactly what you're looking at
9 at that point in time, do you?

10 A. You know, I look at the images and then I usually give
11 that back to the investigator to conduct further examination or
12 investigation if needed.

13 Q. You are familiar with what's known as virtual child
14 pornography?

15 A. I've heard that term, yes.

16 Q. What do you understand that to be?

17 A. It would be a computer generated picture of a child
18 engaged in sexual activity.

19 Q. Which might in fact not be an actual child engaged in
20 sexual activity at all, correct?

21 A. That's possible, yes.

22 Q. Have you not previously testified that simply by
23 eyeballing a digital image or looking at a digital image, you
24 can't say if what you're looking at is an actual child or a
25 computer generated child or an altered image of a real child,

1 can you?

2 A. Not with a hundred per certainty, no.

3 Q. How would -- do you know if anybody who can do that?

4 A. You can take a picture and you can tell if it's been

5 altered based on the pixels in the picture. That can be done.

6 There's experts that can do that. I personally cannot.

7 Q. I'm talking about this Detective Holloway. I didn't mean

8 to interrupt you. I go to my computer, I plug whatever

9 somebody has told me to plug into and an image comes up that

10 I'm looking at. It appears to be a 10-year-old child engaging

11 in sexual activity with a 25-year old person. By merely

12 looking at that, whether you're Detective Holloway, or me, or

13 my client, would any of us be able to know if that involved the

14 sexual exploitation of an actual child or was an altered image

15 involving an actual child or an entirely computer generated

16 image of an actual child?

17 A. If it's a picture of what depicts a child engaged in

18 sexual activity, in my opinion that is child pornography.

19 Q. Are you aware of holding in United States Supreme Court of

20 Ashcroft vs. The Free Speech Coalition?

21 A. I said my opinion was that that is child pornography.

22 Q. Okay. But are you aware, Detective Holloway, that the

23 United States Supreme Court has determined that it is perfectly

24 legal for citizens to possess under the First Amendment virtual

25 child pornography if it does not involve the sexual

1 exploitation actual children, are you aware of that?

2 A. I'm not aware of that exact statute, no.

3 Q. You're not aware of that holding in that case?

4 A. I don't know all the legal ramifications of that. I'm

5 not -- that's not my area of expertise at all.

6 Q. So your description of child pornography would be any
7 image which depicts what appears to be a minor child engaging
8 in explicit sexual conduct either with another child or with an
9 adult?

10 A. Yes.

11 THE COURT: Mr. Smallwood, let me ask. The question
12 before Mr. Smallwood wanted to get your legal opinion was
13 simply when you look at it can you tell the difference?

14 THE WITNESS: Between a real and a fake picture?

15 THE COURT: Yes.

16 THE WITNESS: It depends a lot on the picture. I mean
17 you can't really tell with a hundred percent certain. I mean,
18 you can look at the shadows and the pixel difference based on
19 the shadowing of the picture and the different colors. You can
20 tell a lot of times by that, yeah, you can look at that and
21 know, but not with a hundred percent certainty, no, sir.

22 THE COURT: So if somebody laid down several virtual
23 photographs in front of you, you wouldn't be able to know with
24 any certainty they were virtual versus than actual?

25 THE WITNESS: No, I could not.

1 MR. SMALLWOOD: I'm sorry, do you have any further
2 questions, Your Honor?

3 THE COURT: Go ahead.

4 MR. SMALLWOOD: I didn't mean to interrupt you, Judge.

5 THE COURT: If you guys want to just carry on without
6 me.

7 MR. SMALLWOOD: No comment.

8 Q. (By Mr. Smallwood) Following up on the Judge's questions,
9 are you aware of any technique, software, program, machine,
10 filter, anything that would aid any citizen in looking at an
11 image, a digital image on a computer screen to determine if
12 that image depicted and actual child being sexually exploited
13 in explicit sexual conduct or a virtual image?
14 A. I'm not aware of one, no.

15 THE COURT: Mr. Smallwood, isn't that what we're here
16 today to talk about?

17 MR. SMALLWOOD: That's correct, Your Honor.

18 THE COURT: And I'm not sure how much more he's going
19 to provide in that regard.

20 MR. SMALLWOOD: Not very much, Judge.

21 THE COURT: All right.

22 MR. SMALLWOOD: If I might approach a witness with an
23 exhibit, Your Honor?

24 THE COURT: Yes, go ahead.

25 MR. SMALLWOOD: This is out of context, Your Honor.

1 This is Defendant's Exhibit No. 40.

2 THE WITNESS: Thank you.

3 Q. (By Mr. Smallwood) Detective Holloway, these are
4 documents that we received, the defense received through the
5 discovery process. Are you familiar with these documents?

6 A. Yes, I am.

7 Q. They are labeled, stapled together labeled Defendant's
8 Exhibit No. 40. They are Bate stamp numbered Pages 194 there
9 through 201 at the bottom of the right-hand corner of each
10 page. Beginning with Bates stamp number of that document 197,
11 the top of that under Child Identification Report contains what
12 I would describe as a disclaimer. What's your opinion of what
13 that statement is? It begins "the following does not
14 constitute a verification."

15 A. Right.

16 Q. What is that, what does that mean to convey?

17 A. That means to me that just based on their report you can't
18 assume that that's a child victim, you need to contact the
19 actual investigator who contacted the child what's this
20 document is for, is to let us know who the actual investigator
21 is that can identify the series.

22 Q. Okay. And that disclaimer is contained on that document
23 even though there is a significant amount of personal
24 information. We've got a series named Kathy; agency, National
25 Crime Intelligence Service; investigator, Michele Daniels with

1 a phone number and an e-mail number, but the Government still
2 cannot -- does not determine that that's actual verification
3 that that involved an actual child, right?

4 A. That this is -- the way I used this was through, we sent
5 the pictures to Baltimore and they were looked at. They
6 identified them as being known series. They also responded
7 that this was -- the place in Baltimore was with the FBI.

8 Q. Okay. But the citizen looking at a computer screen
9 doesn't have any access to that data or information base, does
10 he?

11 A. No.

12 MR. SMALLWOOD: May I have just a second, Your Honor?

13 THE COURT: Go ahead.

14 MR. SMALLWOOD: I pass the witness, Your Honor.

15 THE COURT: All right.

16 MR. SMALLWOOD: We would offer Defendant's Exhibit 40,
17 Your Honor.

18 THE COURT: All right.

19 MR. GREER: No objection, Your Honor.

20 THE COURT: Without objection it will be admitted. Go
21 ahead, Mr. Greer, your witness, sir.

22 MR. GREER: Thank you.

23 CROSS-EXAMINATION

24 BY MR. GREER:

25 Q. Detective Holloway, very briefly. In regards to what

1 counsel had asked you in relation to an image, a virtual image
2 of child pornography do you recall that line of questioning?

3 A. Yes.

4 Q. And in that vein, have you had occasion to see for
5 yourself an actual image of a -- or excuse me, an image of a
6 virtual child?

7 A. Not that I know of. I've never seen one.

8 Q. And are you aware of the current state of technology in
9 relation to creating a virtual child by computer?

10 A. I'm somewhat aware, yes.

11 Q. And from your knowledge what is the state of that
12 technology?

13 A. It's pretty much in its infancy, it's still being learned.
14 It takes quite a bit of expertise and knowledge and specific
15 computer equipment to do that.

16 Q. And are you aware -- well, I'll withdraw that.

17 MR. GREER: If I could just have one moment, Your
18 Honor?

19 THE COURT: Go ahead.

20 Q. (By Mr. Greer) So when you were responding to those
21 questions by counsel as to virtual child pornography or images
22 of virtual child pornography --

23 MR. SMALLWOOD: Your Honor, I'm going to object to
24 this definition unless we can get a definition out of Ashcroft
25 of what virtual child pornography is.

1 THE COURT: Well, first we're going to let him ask the
2 question and then we can talk about objecting to it. Who
3 knows, you may agree with the question.

4 MR. SMALLWOOD: I'm sorry, Judge, I thought he was
5 finished. I apologize to counsel.

6 THE COURT: Go ahead, Mr. Greer.

7 Q. (By Mr. Greer) In relation to an image of virtual child
8 pornography, that question asked to you by counsel, were you --
9 when you responded that you could not tell a difference if
10 images were laid out in front of you, were you referring to the
11 fact that you could not tell a computer generated child from an
12 actual child in a photograph?

13 A. That's correct, yes.

14 Q. And can you or have you ever -- let me ask you this, have
15 you ever been seen a virtual child?

16 THE COURT: Now Mr. Smallwood, do you want me to
17 strike that response from the record and grant your objection,
18 sir?

19 MR. SMALLWOOD: I withdraw my objection.

20 THE COURT: Who knew, right.

21 Q. (By Mr. Greer) Let me ask you this. Have you ever, in
22 your experience that you have testified to, seen an image of a
23 virtual child created by a computer?

24 A. Not that I'm aware of, no.

25 Q. And are you aware of why it is you have not seen such an

1 image in the experience that you have had?

2 A. Like I said, I think this is still an evolving field and
3 the expertise and the time that it would take to create one
4 would limit a normal person from being able to do that.

5 Q. And would that knowledge assist you if you were viewing
6 digital images in determining, in making, in forming an opinion
7 of whether or not that the image contained an actual child or
8 some virtually created child?

9 A. Would you say that again? I'm sorry.

10 Q. Yes. Would that opinion, that information you have
11 developed, would that assist you in determining whether in an
12 image there was a virtual child or a real child?

13 A. No.

14 Q. Have you been made aware of the state of technology in
15 regards to films through Hollywood and so forth in regards to
16 computer generated images?

17 A. Yes. Yes.

18 Q. What have you been made aware of in regard to the state of
19 the technology in that area?

20 A. With Hollywood and the money they have and the expertise
21 and the equipment they have, they haven't even got it down very
22 good yet. You can tell by watching a video or a film that the
23 video is, you know, the video, the animated object is put onto
24 the video later, you can tell a difference in it. It's just
25 not there yet. I mean, it's good. Hollywood can do it with

1 all of their money, but a normal layperson would probably not
2 be able to create a video like that?

3 Q. And in regard to moving pictures or a movie, is there a
4 difference in evaluating that versus a single image in
5 determining whether you are viewing virtual child pornography
6 or actual child pornography?

7 A. Yes.

8 Q. What is that distinction?

9 A. Based on the movement of the persons or objects in the
10 video, and also the shadowing, the skin color and the tint
11 would make a difference to me. I think you could pretty easily
12 discern the difference.

13 Q. From your experience is it equally as difficult, easier or
14 more difficult to create a virtual, virtual child pornography
15 in a movie setting versus an image?

16 A. It would be easier to do an image, I believe.

17 MR. GREER: Just one moment, Your Honor.

18 THE COURT: All right.

19 MR. GREER: I pass the witness, Your Honor.

20 MR. SMALLWOOD: Just briefly.

21 THE COURT: Mr. Smallwood, go ahead.

22 REDIRECT EXAMINATION

23 BY MR. SMALLWOOD:

24 Q. Detective Holloway, are any of the images charged in this
25 indictment moving images, video, moving images?

1 A. No.

2 Q. They are all static, are they not?

3 A. Digital picture?

4 Q. But they're static, they're not moving?

5 A. Yes.

6 Q. Are you familiar with Photoshop software?

7 A. I've never used it but, yes, I'm aware of it.

8 Q. What do you understand it to be?

9 A. You can create pictures, alter pictures, inlay pictures on
10 top of pictures.

11 Q. You're using the term "picture". Are you using that in a
12 technical sense or lay general sense?

13 A. Just a general sense.

14 MR. SMALLWOOD: Okay. That's all, Your Honor.

15 THE COURT: Mr. Greer, anything further, sir?

16 MR. GREER: No, Your Honor, thank you.

17 THE COURT: Let me ask you this, sir: Would you agree
18 that the day, as a technological matter that the day may well
19 come when it is simply not possible to distinguish between real
20 and virtual images?

21 THE WITNESS: The way technology is that would not
22 surprise me.

23 THE COURT: Do you have an opinion as to whether, with
24 respect to still photographs at least, whether that day is here
25 or you just don't have -- don't know?

1 THE WITNESS: I can't say for certainty. It's on its
2 way. I think people are getting better at it. But like I said
3 it goes back to the expertise of the person doing it. A normal
4 layperson would have a difficult time doing that.

5 THE COURT: Right. But the question is whether -- I
6 mean, it's a big industry, right?

7 THE WITNESS: Yes, sir.

8 THE COURT: And certainly if somebody were able to
9 produce virtual images, thus avoiding any liability for
10 viewers, right?

11 THE WITNESS: Yes.

12 THE COURT: That would be an enormous market
13 incentive, right?

14 THE WITNESS: Yes, it would.

15 THE COURT: And presumably somebody with that kind of
16 market incentive could get their capital investment back
17 because the market is so huge, right?

18 THE WITNESS: Yes.

19 THE COURT: All right. So I'm just trying to
20 determine whether from where you sit and what you've seen,
21 whether you believe generally -- and we're going to hear more
22 testimony on it -- but generally whether the day is here, or
23 whether you don't know the day is here, or you believe the day
24 is not here?

25 THE WITNESS: I'm not -- I don't know if it is here or

1 not, sir.

2 THE COURT: But you feel it coming?

3 THE WITNESS: I feel it coming on, yes.

4 THE COURT: All right. Anything further, Mr.

5 Smallwood, of this witness?

6 MR. SMALLWOOD: No, Your Honor.

7 THE COURT: Mr. Greer, anything further, sir?

8 MR. GREER: No, Your Honor.

9 THE COURT: All right. Thank you, sir, you may step
10 down. I appreciate it.

11 THE WITNESS: Thank you.

12 THE COURT: All right. You may call your next witness
13 sir.

14 MR. SMALLWOOD: Your Honor, may I have a brief minute
15 to discuss with you and counsel an exhibit housekeeping matter?

16 THE COURT: All right. Go right ahead.

17 MR. SMALLWOOD: If I may approach the bench -- not the
18 bench.

19 THE COURT: Yes, go ahead. Do you-all need to talk
20 about something first?

21 MR. SMALLWOOD: No, we can do this in open court.

22 Your Honor, I intend offering through there Mr. Boland
23 what he have marked as Defendant's Exhibit 33. I would ask to
24 be able to explain that to you a little bit as well to counsel.

25 This is a -- Exhibit 33 is a compilation of Exhibits 1 through

1 31. Now, Exhibits 1 through 31 each will be presented to the
2 Court, and it's my understanding that Mr. Boland has burned two
3 CDs of all of these individual exhibits which we're going to
4 ask be made a part of the record for record purposes. These
5 are images. Exhibit No. 33 contains 1 through 31 images from
6 each of those individual exhibits, and I will be referencing
7 those for the Court and counsel's benefit. I would also
8 reference to you on the back, Judge, of this exhibit, since Mr.
9 Boland was a little fearful of putting these in his computer
10 bag going through an airport check out -- and Mr. Boland will
11 testify that none of these images involve any sexual
12 exploitation of minor children. However, I would like to
13 caution the Court and anybody who might be present in the court
14 that you're going to see some images which we certainly feel
15 like are dead bang ringers for actual pornography. I wanted to
16 make that as a disclaimer, if you will, Judge.

17 And what we choose to do, we will offer Defendant's
18 No. Exhibit 33 but at the appropriate time we're also going to
19 offer the CD which will contain all of the images in Exhibits 1
20 through 31. I don't know if the Court wants to view all of
21 those before admitting those into the record. Mr. Boland will
22 testify that those, they contain all of the Exhibits 1 through
23 31 about which he's going to testify and which the Court will
24 see. But I've never done this kind of record before and I
25 don't know exactly how the Court chooses to proceed.

1 THE COURT: Well, I'm not in the habit of doing this
2 kind of record myself, but which is why I thought that the
3 authorities submitted by the United States were extremely
4 helpful in this regard this is United States vs. Marchand
5 because that went to what appeared to me to be a very similar
6 circumstance and desire on the part of the court there to try
7 to develop the appropriate record and in so doing the Court
8 took some issue with the fact that some of the images produced
9 there were clothed and, therefore, didn't have the same
10 probative value if it had been if they were not. I guess what
11 I'm basically saying is that there's -- like taking fishhook
12 out of your hand, there's no way to pull it back out, you've
13 got to push it all the way through, so I think all we can do is
14 hook it up and go.

15 From the standpoint of the United States, does that
16 make sense to you Mr. Greer? And Ms. Morgan, provided this
17 case as well, as far as -- I mean, I think that the only choice
18 for purposes of the record is to simply put on the whole stuff
19 and go from there. Right?

20 MR. GREER: Agreed, Your Honor.

21 THE COURT: All right. Go ahead, sir.

22 MR. SMALLWOOD: Call Mr. Dean Boland to the witness
23 stand, Your Honor.

24 THE COURT: All right. Would the witness please come
25 forward and be sworn.

1 DEAN BOLAND

2 Called as a witness on behalf of the defendant, being first
3 duly sworn, testified as follows:

4 MR. SMALLWOOD: Your Honor, may I address the Court
5 briefly?

6 THE COURT: Yes, go ahead.

7 MR. SMALLWOOD: Before I begin Mr. Boland's testimony
8 I hope we have the screen back here which I asked your crew to
9 set up for me. I may -- I'm not going to try to turn my back
10 to the Court, but I may need to be referencing that screen
11 while I examine.

12 THE COURT: All right. That will be fine. And I
13 actually have a screen here which I anticipate will be the --

14 MR. SMALLWOOD: But this is going to be the only
15 screen I'm going to have, Judge, I think, from to view from the
16 podium.

17 THE COURT: All right. Go ahead, sir. Now, would you
18 be better off if the podium were at the end of the jury box?
19 We could do that certainly.

20 MR. SMALLWOOD: Judge, I might be better off if the
21 podium could be over here at the end of the Government's table,
22 if that would be possible?

23 (Off-the-record discussion in reference to relocating
24 the lectern.)

25 THE COURT: All right. Does the microphone work from

1 there?

2 THE BAILIFF: Yes, sir.

3 THE COURT: Is that better for you, Mr. Smallwood?

4 MR. SMALLWOOD: That's fine, Judge. That will work
5 fine.

6 THE COURT: All right.

7 DIRECT EXAMINATION

8 BY MR. SMALLWOOD:

9 Q. State your name and occupation, please, sir?

10 A. My name is Dean Boland. I'm a licensed attorney in the
11 state of Ohio and I also run a consulting firm that specializes
12 in consulting to lawyers and law firms about technology issues.

13 Q. I have handed you what's been marked as Defendant's
14 Exhibit No. 34. I have provided the Court a copy as well as
15 counsel, it's a four page document that purports to be your CV.
16 You're familiar with that, are you not?

17 A. Yes.

18 Q. You created that document?

19 A. I did.

20 Q. Is it accurate through the current date?

21 A. It is.

22 Q. In addition to what is contained on Defendant's Exhibit
23 No. 34, have you been qualified as an expert witness in the
24 area of digital imaging in any courts?

25 A. Yes, I have.

1 Q. And in what courts and when?

2 A. Twice as a coincidence in the month of March -- and
3 actually three times in the month of March in three criminal
4 cases in the State of Ohio. I was qualified as an expert
5 witness in digital imaging and computers generally. All three
6 of those cases dealt with similar issues as this case, that is
7 the allegation that an individual possessed digital images of
8 what the government felt were child pornography.

9 Q. And those are three separate case?

10 A. Yes, three separate criminal cases one Portage County,
11 Ohio, one in Summit County, Ohio, and one in Columbiana County,
12 Ohio.

13 Q. And those determinations were made by three separate
14 courts?

15 A. Yes, that's correct.

16 MR. SMALLWOOD: Your Honor, I believe the Government
17 and I have a stipulation to the admissibility of Defendant's
18 Exhibit No. 34, obviously giving the Government the right to
19 cross-examine that document in lieu of going through everything
20 on it. Do I state that correctly?

21 MR. GREER: Yes.

22 THE COURT: All right, go ahead.

23 Q. (By Mr. Smallwood) Do you have a degree in computer
24 science?

25 A. No, I do not.

1 Q. Do you teach any areas of computer science?

2 A. Yes.

3 Q. And what do you teach and where do you teach that?

4 A. For about three years now I've been an adjunct professor
5 of technology at Cleveland State University Law School in
6 Cleveland, Ohio. And prior to that I spent, I'm trying to
7 recall, two or three years teaching at Case Western Reserve
8 University School of Law, which is my alma mater from where I
9 graduated in 1995. And in both locations I taught the
10 identical two courses which were designed by me at the request
11 of the staff or the dean of the Case Western Reserve University
12 Law School. The first semester of each year I teach a course
13 called you "Computers and the Law" which deals with each week a
14 different type of computer crime, how it's prosecuted, the
15 federal and state statutes that are involved, as well as
16 federal and state cases and unresolved issues with that area of
17 crime. In the second semester of every year, which is the
18 semester I'm in now, I teach course entitled "Electronic
19 Evidence" which deals with a host of issues, some of which you
20 touched upon this morning with Detective Holloway. Forensic
21 analysis of computers, properly seizing and searching
22 computers, digital images that are found on a computer and how
23 they're handled. And each semester since the fall of 2001,
24 I've had a class session each one of those semesters,
25 specifically on the Free Speech Coalition case along with the

1 issues attendant to that case.

2 Q. Do you work with a consulting company?

3 A. Yes, I have my own consulting company, as I had mentioned
4 earlier, that provides consulting on a range of issues beyond
5 just the digital imaging. I have forensic analyst experts who
6 work for me in a subcontracting relationship. Law firms hire
7 me to try and guide them through the process of how they obtain
8 electronic evidence off of the computers and I go out and find
9 the experts they need if I'm not the person they're interested
10 in, because it's not necessarily a digital image issue, and
11 then I assist them with both legal and technological issues
12 through that process.

13 Q. What is your personal experience with digital imaging
14 technology?

15 A. I've been involved in photography as a hobby for 15 or 20
16 years now. My father and I started many years ago when he was
17 still alive in just regular film photography. I had stint of
18 actually developing my own photographic images in a darkroom
19 that I tried to design in my home, and for the past five years
20 or so I have been doing both photography and digital imaging
21 professionally as a part-time hobbyist but also presenting or
22 combining digital images for presentations at weddings,
23 graduation parties, for organizations as well as capturing,
24 modifying and editing digital images for use in materials that
25 were of benefit to clients of mine who were candidates for

1 judicial offices as well as other political offices in the
2 Cleveland area, and I continue to do that to this day, along
3 with owning a digital camera for several years and compiling
4 just family digital images as well and editing those as need be
5 for whatever sort of personal purposes.

6 Q. Are photographic images and digital images the same thing?

7 A. They are not.

8 Q. Distinguish for the Court or state to the Court, give your
9 opinion to the Court what the basics of film photography are?

10 A. Okay. A film -- photograph as I define it can only be
11 created in one way, and that is a material is placed in the
12 back of a camera, most often today it's plastic, which is the
13 film, covered with a chemical that's reacting to light -- most
14 often used is silver halide -- and when the shutter of that
15 camera opens, light hits that plastic material, the silver
16 halide reacts and creates a negative image on the film which
17 all of us are familiar with. That negative is then put into an
18 enlarger and light is passed through the negative, an image is
19 then projected on to photo-sensitive paper which is what a lot
20 of us are familiar with, Kodak paper, what they try to
21 advertise that you use, and then a print of that negative is
22 created and then for whatever purpose that's used.

23 That basic steps I just brought you through is the
24 only way to create photographs. There's not any method.
25 There's different chemicals that can be used, there's different

1 exposure times, types of cameras, certainly, but the basic
2 process of that development and the chemicals that are used
3 there is the only way you can create print from photography.

4 Q. Would it be an accurate statement then in the sense of
5 photographic images to describe the negative as the original?

6 A. Yes.

7 Q. And the prints would be the copies?

8 A. Yes.

9 Q. Are you familiar with technology involving the alteration
10 of photographic negatives?

11 A. Yes, I am. That's --

12 Q. Is that easy to do?

13 A. It is not.

14 Q. Describe what it's difficult.

15 A. The way that photographic negatives, after they have been
16 captured in a camera, to be altered, there has to be some
17 chemical in one type of alteration or paint or oils that are
18 applied right to the surface of the negative itself. A common
19 example you will see in publications is a black and white shot
20 of a child running down the street on an Easter day, for
21 example, and then person will go in afterwards, and using
22 special oils that adhere to a negative they might paint a color
23 for the child's hat and purse that they are carrying and their
24 shoes, and they will make an interesting composition of what
25 appears to be black and white image, but yet have some color

1 components. That, when it's photography, is done by actually
2 painting on the negative.

3 Q. Manually, by hand?

4 A. Exactly. Therefore, if someone were suspicious about a
5 print having come from an altered negative, all they need to do
6 is, either with their eye or under a microscope examine that
7 negative and they would see that type of evidence of an
8 alteration having been made.

9 Q. So anybody with any degree of expertise in that area would
10 have little difficulty in determining an altered photographic
11 negative?

12 A. Yes. And I think even just the average person, if you
13 just throw it under a microscope, would see things that
14 wouldn't look right to their eye. And to do such an alteration
15 in a way that's undetectable to the next viewer is exceedingly
16 difficult and would take someone with a lot of photographic
17 experience and a lot of equipment to do that.

18 Q. What is a digital image and how does it differ from a
19 photograph?

20 A. Digital images are created in one of three ways. As
21 opposed to photograph which has one method way to be created,
22 digital images have three. One is a digital camera that can
23 capture an image just like a film camera but captures it in a
24 digital format. The second way would be a scanner upon which
25 you can put an object or a print photograph and then scan it

1 in. It's now a digital image.

2 Q. Let me ask you there. Once what everybody acknowledges is
3 a print from a photographic negative -- and is "digitize" the
4 correct word?

5 A. Yes, that's accurate.

6 Q. Does that former photograph, once it is digitized, lose
7 it's characteristics as the photograph and then become a
8 digital image?

9 A. Yes. It's two different things. I tell my students and
10 in the CLE programs that I teach to lawyers and others, there's
11 no such thing as photograph on the internet. There can't be
12 one. The only things people see on the internet are digital
13 images.

14 Q. They may have started life as a photograph?

15 A. May have, but they're not -- you can't see a photograph on
16 the internet because your monitor is only capable of displaying
17 electronic files and are in pixels that show up there. It
18 can't display a paper photograph that you can touch and hold
19 and walk around the room with.

20 Q. Does the term "original" basically have any meaning when
21 we are talking about digital images?

22 A. It doesn't. The reason it doesn't is because of the
23 ability, when a digital image is captured one in one of those
24 three years -- oh, let me, I left one of the ways out following
25 your last question. The third way a digital image can be

1 created is a blank screen upon which someone uses software to
2 attempt to digitally paint whatever it is in their imagination
3 they want to paint on a screen. That's a third way that a
4 digital image can be created.

5 Now as to your question here, the fact that there is
6 no real original is because a digital image can be copied
7 infinitely without any degradation in the quality. If I
8 captured a digital image of this courtroom, I could copy it for
9 as many people that are in this room, hand them a all CD or
10 whatever copy that I gave it to them in, and if they looked at
11 that image, every pixel would be identical. A forensic
12 analysis of that image would reveal that nothing has been
13 altered between the various copies because a computer can copy
14 this information endlessly without degradation whereas even in
15 print photography a negative can't make an exact print every
16 time. There's dust in the air, the paper is not uniformly
17 created, there's chemicals can react slightly differently or
18 they can run low on their consistency, et cetera. I mean, it
19 might take a microscope to detect those variances but a
20 negative can never make 15 absolutely identical prints, whereas
21 digital imaging you could make as many identical prints as you
22 want. Identical -- I'm sorry, copies of that electronic image.

23 Q. Can digital images be altered?

24 A. Yes, easily.

25 Q. In what ways?

1 A. There's an infinite number of ways they can be altered.
2 It's limited by the imagination of the person the type of
3 software they either purchased or was given to them freely when
4 they bought their computer or their monitor or whatever product
5 they purchased. If they want to spend a little bit of time
6 they can make some alternations rather quickly, many of which
7 are undetectable. If they want to spend more time and are
8 graphic artists or people who do images for covers of
9 magazines, those folks who spend 4 and 6 and 8 hours a day
10 doing this they can make, as I said, an infinite number of
11 alterations to that image.

12 Q. Is it proper to use the terms "fake" or "real" when we're
13 talking about digital imaging?

14 A. No, it isn't.

15 Q. Why?

16 A. Well, because an image, a digital image can be altered.
17 That doesn't necessarily make it fake. And here would be the
18 example. I capture a digital image of this courtroom, and then
19 using tools in the software that I have here today, Photoshop,
20 there's a blurring tool that's in amongst the hundreds of tools
21 available there. I blur slightly some object in that digital
22 image. We now have an altered a image but it's not fake.
23 Everyone who was captured in the original image is still there,
24 that's who they are et cetera.

25 Another sort of more sort of dramatic example would be

1 to take a portrait of someone from maybe the chest up, let's
2 say, standing with their suit and tie on and then just select
3 the head as it appears in the digital image and alter the
4 proportions of their head make it look sort of like a
5 panovision, make it look narrower wider. To someone who knows
6 that individual they're still recognizable, but you can
7 obviously tell, your eye would tell something's been changed.
8 That's not a fake image in the sense that it's not that person
9 but it's clearly an altered image.

10 Q. How would you analyze a digital image to attempt to
11 determine if any alterations had been made to the image as it
12 began life?

13 A. The overwhelming majority of those analyses would be
14 visual, something that someone with a lot of photographic
15 experience could also do. You would look at do shadows not
16 seem to fit, are there objects in the scene that appear like
17 they were placed there, is light hitting from multiple
18 directions when in most photographs, especially naturally
19 composed photographs. Light comes a single source, it doesn't
20 come from 15 different directions. You would look to see if
21 there is objects that are discolored, one shoe is a different
22 color than another things -- and then again, you would just
23 sort of the do the it doesn't look right analysis as well and
24 say I can't say why, but this person's eyes don't look the
25 same, or their hair looks like they've got a wig on, et cetera.

1 But you should go through brightness values contrasts. If one
2 part of scene is in focus and something right next to it is out
3 of focus, cameras don't work that way. The focus generally
4 starts in one locations and gets -- lessens as it goes away
5 from the center of the lens. So you would have to go through,
6 basically, a bunch of visual analyses, but in the end all you
7 would be able to say is I've found what I think are evidence of
8 alterations. You clearly wouldn't be able to say this is a
9 fake image. These people weren't really in that image, the
10 bushes weren't there like they're depicted, the sun wasn't
11 there like it's depicted, you really can't say that. All you
12 can say is it appears to have been altered.

13 MR. SMALLWOOD: Calling the Court and counsel's
14 attention to Defendant's Exhibit No. 33. We initially
15 mismarked it, Your Honor, as 34, but I think your copy should
16 be marked correctly as 33.

17 Q. (By Mr. Smallwood) What is this exhibit?

18 A. That is what's called a contact sheet that was produced to
19 sort of be a reference guide for the exhibits that we're using
20 here today. I produced that contact sheet, and as you pointed
21 out, I put the information on the back just as a hopeful
22 protection for myself in the event that I was traveling
23 somewhere, and especially in the airport the other day and
24 someone -- I was randomly picked to search my bag and if they
25 pulled that out it would have been likely that I would not have

1 been able to attend today had that happened.

2 Q. And what software did you use to create this document?

3 A. This was created in Photoshop CS, which was the eighth
4 version of Photoshop software, the first version by that name
5 coming out in 1990. And it's the industry leading software
6 package for photo and image editing along with web site design.

7 MR. SMALLWOOD: May I approach your clerk, Your Honor?

8 THE COURT: Yes, go ahead.

9 MR. SMALLWOOD: May I approach the witness, Your
10 Honor?

11 THE COURT: Yes, go ahead.

12 Q. (By Mr. Smallwood) Mr. Boland, I want to hand you what
13 has been marked for purposes of identification as Defendant's
14 Exhibit 37. We're in the process of preparing copies for the
15 Government. The original of that publication is with the
16 Court. Would you describe what Exhibit 37 is?

17 A. Yes. I belong to an organization called the National
18 Association of Photoshop Professionals. It's an organization
19 that people pay an annual fee to join so that they can share
20 techniques, new ideas, tips and tricks that are available for
21 use with the Photoshop software. And this magazine you see
22 here is a publication that I receive, I think, eight times a
23 year, which is full of all kinds of information about not only
24 Photoshop, the software itself, but add-on products which
25 extend the usefulness of Photoshop as well as tutorials that

1 explain the infinite number of things you can do when designing
2 digital images with this product.

3 Q. Is this publication owned by Photoshop?

4 A. No.

5 Q. It has -- the title of the publication is the same as the
6 title of the software?

7 A. It is. The publication is dedicated solely to that
8 software package and with good reason as I mentioned, because
9 it is of the number one image editing software worldwide, so
10 there are hundreds of thousands, if not millions, of users of
11 various versions of this software currently.

12 Q. And you indicated the version that you're going to be
13 describing here today with these images was what you believed
14 to be version number 8?

15 A. Yes, it's version number 8.

16 Q. When did you purchase this particular version of this
17 software?

18 A. My recollection is about six months or ago or so that this
19 version came out and I had version 7 before that.

20 Q. What did you pay for version 8?

21 A. It was \$650. I got a little discount for being in this
22 organization.

23 Q. And do you know or can you tell Court in the area where
24 you live and work, Cleveland, Ohio, how many people have and
25 use this particular version of Photoshop software?

1 A. I wouldn't know the stats of how many they've sold, but I
2 have 20 or 30 both friends, colleagues and actual clients who
3 this is their main software program they use to actually make a
4 living. If they didn't have this software program they
5 wouldn't be able to do what they're doing. They are graphic
6 artists, multimedia designers. I myself am doing it to design
7 both print and on-line imaging as well, so I really couldn't
8 calculate the number. All I can tell you that it is so
9 ubiquitous that it's actually becoming a verb in newspaper
10 articles where they call image editing "photoshoping" an image.

11 Q. Go through Exhibits 37-A through H and describe what those
12 are?

13 A. 37-A is a letter from the editor of this particular
14 publication that highlights in the first sentence that over
15 2000 individuals attended a recent seminar on just this
16 software product and another seminar similar to that is going
17 to be held in September of this year.

18 MR. SMALLWOOD: Your Honor, you have the original
19 document. That's Page 10 --

20 THE WITNESS: Oh, my apologies.

21 MR. SMALLWOOD: -- of your publication. I'm sorry.

22 THE COURT: All right, I've got it. Go ahead.

23 Q. (By Mr. Smallwood) Exhibit 37-B, do we have a page
24 number on that Mr. Boland for the Court?

25 A. I'm looking at Page 18 and this is just a sampling of the

1 various Photoshop seminars that are constantly circling the
2 United States providing intensive workshop atmospheres for
3 people who use Photoshop to extend their skills.

4 Q. And that was 37-B?

5 THE COURT: That's C.

6 A. Mine's not marked but...

7 THE COURT: If you are looking at Page 13, it's 37-B.

8 MR. SMALLWOOD: Yes, that's correct, Your Honor.

9 Q. (By Mr. Smallwood) What about 37-C?

10 A. I was just referring to Page 18 which, I guess, is 37-C.

11 Q. What about the preceding page which should be entitled
12 Exhibit 37-B?

13 A. I don't have that one with me at the moment.

14 THE COURT: Well, that's not the preceding page
15 immediately. That's Page 13. He was on Page 18 which is 37-C?

16 MR. SMALLWOOD: I'm sorry, Judge, I'm referencing my
17 preceding exhibit numbers. May I approach the witness?

18 THE COURT: Yes. Do you need this one here to --

19 MR. SMALLWOOD: Judge, I would prefer that you keep
20 that if you would.

21 Q. (By Mr. Smallwood) If you would describe that to the
22 Court so the Court can view the original publication page?

23 A. I'm looking at 37-B right now, and this is one of the very
24 common ads that's in this magazine, and they change with each
25 edition. And this particular package is what's known as a

1 plug-in. And plug-ins are individuals who noted --

2 MR. SMALLWOOD: That's Page 13, Your Honor, I'm sorry,
3 of your publication.

4 THE COURT: Right.

5 Q. (By Mr. Smallwood) Go ahead, please.

6 A. This is individuals who've noted that there's some feature
7 of Photoshop that if it was just extended a little bit would
8 provide even more functionality for its users. And this one
9 you see here is plug-in which allows you to create, as it says,
10 photo realistic digital lighting and shading effects, with the
11 idea being here that the software is designed so that when the
12 user views the finished image, it doesn't appear as if sunlight
13 was injected or shadows were moved, it appears that nothing was
14 changed. It just has a very pleasing-to-the-eye composition of
15 light and shadows. And that software helps automate that
16 process for people who are making digital images and want to
17 fix an image that didn't have the right light and shadows when
18 it was captured.

19 Q. To make it undetectable as having been altered?

20 A. Yes, that's the point of that software, is to make shadow
21 and light alterations that aren't detectable, otherwise it's
22 not very helpful to print that in magazines or on web sites
23 when the image looks put together by an amateur with obvious
24 light sources that don't belong there.

25 Q. I call the witness' attention to Exhibit 37-D.

1 MR. SMALLWOOD: Your Honor, that's Page 20 of your
2 publication.

3 Q. (By Mr. Smallwood) What does that depict?

4 A. 37-D is the first page of a tutorial which is a common
5 feature of this magazine, and this tutorial continues on to
6 pages -- well, starting at Page 20 and going forward. And one
7 of the examples it provides you here is that you can take a
8 digital image and when you're finished make it appear to be a
9 print photograph that was scanned in and is actually slightly
10 bent and had been scanned in a scanner as opposed to originally
11 starting as a in digital image. It allows you to create that
12 false sense in the viewer's eye that what they are looking at
13 is something different than what it really started as.

14 Q. It's really a digital image which attempts to create the
15 illusion that it's a an image of a photograph?

16 A. Exactly.

17 Q. Calling your attention, sir, to Exhibit 37-E.

18 MR. SMALLWOOD: Your Honor, that's pages 30 and 31 of
19 your publication.

20 Q. (By Mr. Smallwood) What is that?

21 A. 37-E is an example. It's a second edition of a three-part
22 series by an individual who is well known in this Photoshop
23 community, Bert Monroy, for his ability to create photo
24 realistic backgrounds. And what you're looking at in the black
25 and white is more easily seen in the copy that the Judge has.

1 It's what appears to be an outside photograph of this Oakland
2 theatre, or whatever they're purporting it to be, with various
3 neon lights and bulbs sticking up. And the reality is
4 everything you're looking at on that page was completely
5 created in Photoshop software and the pages following this
6 Exhibit 37-E details some of the tips and hints of how to
7 create photo realistic objects that are contained in that
8 image.

9 Q. Calling our attention to 37-F --

10 MR. SMALLWOOD: Your Honor, that's Page 46 of your
11 publication.

12 Q. (By Mr. Smallwood) What does that reflect?

13 A. This is the beginning of a tutorial, which as it says,
14 helps you compensate for flash and backlighting errors in an
15 image that you have captured where you have too much shadow in
16 the foreground and a light source from the background and it
17 washes out the person or the objects in the foreground, their
18 faces, et cetera. And it explains to you how to use Photoshop
19 to correct that problem in the digital image in such a way that
20 it would be undetectable to the next user. And I would like to
21 point out that the author of this, Deke McClelland, is probably
22 the most well-known author of Photoshop manuals. He is a
23 author of a book called the Photoshop bible which every edition
24 of Photoshop that comes out he writes a new version of that
25 manual, and it's a thousand pages long and only begins to tell

1 you all of the different tools in Photoshop and how they can be
2 used.

3 Q. I direct your attention to 37-G.

4 MR. SMALLWOOD: Your Honor, that's Page 52 of your
5 publication.

6 Q. (By Mr. Smallwood) What is that?

7 A. Page 52, 37-G is a help to those who have purchased the
8 newest version of Photoshop, and because it's so knew, trying
9 to give them some ideas of some of the automated tools that are
10 built into this version that weren't in the previous version,
11 and the ones they are talking about in this tutorial is a
12 shadow highlight command which allows you to take an image,
13 again, with the strong backlighting that has put the faces in
14 shadow, and make a few quick alteration and the faces now come
15 out of shadow in a way that, again, it's undetectable to the
16 viewer who views the resulting image.

17 Q. Calling your attention, Mr. Boland to 37-H.

18 MR. SMALLWOOD: Your Honor, Page 60 of your
19 publication.

20 Q. (By Mr. Smallwood) What does that reflect?

21 A. This is a tutorial about vacation photos. And as you can
22 see, the first digital image there shows the child on top of
23 the adult's shoulders or on their back with their faces in
24 shadow because of the strong backlighting, and through a few
25 alterations in Photoshop you can bring out the light on their

1 faces and compose a more pleasing vacation photo than the one
2 you had that you started with.

3 MR. SMALLWOOD: Your Honor, we would offer Defendant's
4 37-A through 37-H. Obviously the Government has the right to
5 cross-examine.

6 MR. GREER: No objection, Your Honor.

7 THE COURT: All right. Now, has the United States had
8 an opportunity to see it in this version, sir?

9 MR. SMALLWOOD: No, sir, they have not.

10 THE COURT: All right, let me hand that down to the
11 United States to take a look at that --

12 MR. GREER: Thank you, Your Honor.

13 THE COURT: -- for purposes -- you can take it back to
14 your table and we will proceed.

15 MR. GREER: Thank you.

16 THE COURT: All right, go ahead, Mr. Smallwood.

17 MR. SMALLWOOD: May I approach the witness?

18 THE COURT: Yes, go ahead.

19 Q. (By Mr. Smallwood) I hand you what's been marked for
20 purposes of identification as Defendant's Exhibit 35. The
21 Court has the original complete publication. What is
22 Defendant's Exhibit 35?

23 A. That is the complete publication of the Star tabloid
24 publication that's common in grocery stores, et cetera. And I
25 purchased this at the airport in -- I don't know if it was-- I

1 think it was in Cleveland before I left to come here yesterday
2 and the reason I did was I had initially purchased the Wall
3 Street Journal to just read and pass the time and there was an
4 article in yesterday's Wall Street Journal in which the Star
5 magazine admitted that this cover photo that's on this magazine
6 has been digitally altered. Demi Moore, the actress who
7 appears to be wearing a white dress is actually wearing a dress
8 that's colored chocolate brown, and the individual next to her,
9 her boyfriend, Ashton Kutcher, is on the cover apparently
10 wearing a white suit outfit, and that outfit is actually
11 colored pink. And they admitted altering, digitally altering
12 these images in a way that obviously viewers can't tell, to
13 make the white theme go with their story that these two are
14 going to be getting married.

15 MR. SMALLWOOD: May I approach, Your Honor?

16 THE COURT: Yes, go ahead.

17 Q. (By Mr. Smallwood) I'm going to hand you what's been
18 marked for purposes of identification as Defendant's Exhibit
19 No. 36. Is that a copy of the Wall Street Journal article you
20 mentioned?

21 A. Yes, it is. And the reason that I brought this with me is
22 because I didn't realize -- after looking through the news
23 stand I saw the cover of this magazine, amongst others, sitting
24 there, and until I read the Wall Street Journal, I was not able
25 to tell and still can't tell that these images on the cover of

1 this magazine were edited to severely from dark brown to white.
2 It wasn't apparent to me and that's why when I read this Wall
3 Street Journal I brought it along with that tabloid to just
4 demonstrate that even a person who looks at digital images all
5 day long and does it for a regular, as part of my living, I was
6 fooled very easily.

7 MR. SMALLWOOD: Your Honor, we would offer Defendant's
8 Exhibits 35 and 36.

9 THE COURT: All right. Without objection they will be
10 admitted.

11 Q. (By Mr. Smallwood) Referencing again, Mr. Boland
12 Defendant's Exhibit No. 33. Will you queue up your technology
13 there and go through in as rapid a fashion as you can, without
14 truncating your testimony, Defendant's Exhibits No. 1 through
15 31 and describe what those are and how they have been treated
16 by you?

17 A. Defendant's Exhibit 1, which I'm bringing up on the screen
18 now, is what appears to be two individuals, two females on the
19 edge of what appears some body of water and the individuals'
20 faces on this digital image that I created are actually the
21 faces of two minors who are famous actresses, Mary-Kate and
22 Ashley Olsen, the Olsen twins. I took their faces off another
23 image and merely superimposed them over a starting image. And
24 I'll back this off so you can see the starting image that I
25 started with. As you'll note your eye, although it might think

1 there's a body of water in front of them, the divider in the
2 middle of that image was inserted by me as well as the
3 reflection at the bottom of that screen. It's merely a copy of
4 the lower portion of the existing image and then applying some
5 filters to that copy to make it appear as if it's under water.

6 In --

7 Q. Before you continue. All of these images that you're
8 going to testify in 1 through 31 were created by you with this
9 Photoshop software?

10 A. That's correct.

11 Q. Okay. Continue please.

12 A. Or they were -- to qualify that, or they were images I
13 started with and then modified in Photoshop.

14 Q. With this software?

15 A. Yeah, I didn't create any of the images, so to speak. The
16 starting images were just ones that I started with downloading
17 from the internet, et cetera.

18 Q. Okay.

19 A. So the reflection was created by me. And as you'll notice
20 as I click on this last layer, the female depicted at the top-
21 most portion of the image, you'll see her face change.

22 Q. Is this the original image you started with?

23 A. The starting image, we're not there yet, no.

24 Q. Okay.

25 A. So that face of one of the Olsen twins, who's a minor, was

1 superimposed over these obviously naked female bodies that are
2 here. And then if I click the second layer below that you will
3 see the face on the lower female change as well.

4 I want to note here that the two faces of the Olsen
5 twins that are used to cover these two images is actually the
6 same face of only one girls I copied in two different
7 locations. And why I did that is to show you that based on the
8 hair and other way their bodies are positioned, your eye
9 doesn't tell you that this is an identical face in two
10 different spots. They look different to your eye, when in
11 reality its the same face copied twice.

12 Finally, we're at the black and white version of the
13 starting image with the actual -- the image I started with,
14 with the faces as you see them. And then, finally, what you're
15 seeing now is a color version which is the image I started
16 with. You see a red sort of padded material that these two
17 individuals are posed on, et cetera. I started with that and I
18 ended up with the Olsen twins posing naked above what appears
19 to be some body of water.

20 Q. The original image you have started with, where did you
21 obtain that?

22 A. I just downloaded that off the internet doing a search
23 with a search engine to find suitable images to demonstrate how
24 easy it is to alter them in an undetectable way.

25 Q. Okay. Go to Defendant's Exhibit No. 2, please.

1 A. Number 2 is three apparently identical images except for
2 one alteration that's made, and that is the face in each one of
3 these images is different. If you'll --

4 Q. But the torso from the neck down is the same image?

5 A. In fact, even the hair, everything. And as you can see by
6 examining these, there's no obvious border around the faces to
7 indicate that they were plopped onto someone else's body. And
8 anyone being asked to determine which one of these is the
9 quote/unquote "starting image" that's not been altered and
10 which ones are the altered ones would have to guess. You can
11 apply shadows and shading using tools in Photoshop that are as
12 convincing as the shadows, shading and light that was in the
13 original digital image.

14 But just to clarify this for the Court, the face that
15 is in the upper left-hand corner is of a volleyball player and
16 a part-time model, Gabrielle Reece. The face in the center
17 image is of some anonymous person that was captured in an image
18 that I downloaded from a stock photo web site, and the lower
19 right-hand corner image is the face of Britney Spears, the pop
20 singer. The only one of these images that was not altered is
21 the one in the one in the upper left-hand corner Gabrielle
22 Reece. That was an image I started with from the internet that
23 purports to be her posing for that picture. The ones, the
24 faces are just inserted, superimposed to make it appear as if
25 it's someone else.

1 Q. How much time did it take you in Defendant's No. 1 and
2 No. 2 to create these images?

3 A. Well, Defendant's Exhibit Number 1 probably took me half
4 an hour or 45 minutes, I would estimate. It's quite awhile ago
5 that I created that. This image here --

6 Q. Number 2?

7 A. Defendant's Exhibit No. 2 probably took the same amount of
8 amount of time, between 15 minutes or a half hour, because all
9 I was doing was selecting the faces of these two individuals
10 from other images, putting them into the existing image that
11 is -- that I started with that appears to be Gabrielle Reece,
12 and then just doing a little bit of adding shadows and some
13 colorations to make them appear this bluish tint that you see
14 here.

15 Q. Okay. Go to number 3 please.

16 A. Number 3 is designed to have the appearance that it's
17 actually an exhibit from a criminal case. There is the
18 designation of United States vs. Spool, a criminal case number
19 and exhibit number and age of the female that's depicted at
20 being age 13.

21 Q. And that would be to create the illusion for someone who
22 viewed that, is this was actually an exhibit in a federal
23 criminal case of child pornography?

24 A. Exactly. Someone marketing child pornography would have
25 an advantage to say to whoever their customer was, this is, I

1 can prove to you this is real, it's got exhibit case numbers
2 listed all over it. It was somehow surreptitiously removed
3 from a case file, so you can rely on the fact that this is
4 actual child porn.

5 Q. Okay.

6 A. And what you'll see is actually the image is in color. I
7 backed off one of the layers that changes it instantly into a
8 to color image, and in fact the person's face that is depicted
9 there is that of a minor, but you'll notice a few changes when
10 I clicked off the images. Her head disappears, an actual
11 apparent adult face appears and the breast size of the female
12 in the picture has now grown. She goes from what appears to be
13 a flat-chested female to a female with a developed breast. In
14 addition, you see a thin line of pubic hair near the lower
15 portion of her body that's simply just wiped out in Photoshop,
16 there giving the illusion that this is prepubescent minor who
17 hasn't even developed pubic hair. In addition the words at the
18 bottom are completely removed. I put those in. And when I
19 click here you'll see this is the starting image for the minor.

20 Q. This is the starting image for Defendant's Exhibit No. 3.

21 A. Correct.

22 Q. Where was in a obtained?

23 A. That was obtained from teen model web site where parents,
24 for some reason, have decided to allow their children to be
25 photographed in bikinis and various evening wear for purposes

1 of, they claim, trying to get a modeling contract for their
2 daughter.

3 Q. Okay.

4 A. And then finally the starting image at the bottom. This
5 is the starting image of what appears to be adult pornography
6 that was then modified to include this minor.

7 Q. And about how long did it take you to put that together?

8 A. This image probably took me a little longer than the other
9 ones. I would say 45 minutes is probably a good estimate.

10 Q. Okay. Defendant's Exhibit No. 4, and what is the
11 significance number 4?

12 A. Okay. The significance of number four is the ability of
13 Photoshop to create things that don't even exist at all in the
14 world. This image appears to be some sort of a carving in
15 marble or stone, perhaps taken from an Egyptian tomb or Mayan
16 artifact, et cetera. The reality is this image is created by
17 merely creating a layer that appears to be marble and what you
18 see now on the screen is what appears to be the digital image
19 of a tattoo on someone's arm or leg, or wherever it is, and
20 then the marble texture is created in Photoshop. That is not a
21 digital image of marble in the sense that I captured it with a
22 digital camera. Photoshop just created those patterns and
23 thousands more are available around the internet. And then I
24 overlaid it with a blending mode, it's called in Photoshop,
25 which makes that now look like an embossed or a carved-in-stone

1 image that doesn't even exist. Now, why this is significant is
2 because it allows you to put artifacts into existing digital
3 images that appear to the eye to have existed there all the
4 time, carvings and embossed material that wasn't actually
5 there.

6 Q. How long did it take you to put that one together?

7 A. That one probably took me about 10 minutes or so.

8 Q. Okay. Number 5 please?

9 A. Number 5 is a digital image fairly well-known photograph
10 that was taken --

11 Q. That's the sailor bending over the nurse on Victory Over
12 Japan Day, August 15th, 1945?

13 A. Yes, that's a digital image of that photograph because, of
14 course, digital images weren't around at that time. And what
15 this is designed to illustrate is that I've numbered --

16 Q. Pardon me once again though. This began life as
17 photograph?

18 A. That's correct.

19 Q. But it was digitized by you placing it, scanning it into a
20 computer?

21 A. Actually, I downloaded this off the internet. Someone
22 else created it, digitized it, I didn't.

23 Q. Once that was done it's lost its characteristics as a
24 photograph and now has become a digital image subject to all of
25 the alterations that this software can apply?

1 A. Absolutely.

2 Q. Okay. Continue please?

3 A. So I've broken the image up into eight quadrants to
4 demonstrate that even within a single image, some of these
5 quadrants have been altered by me and some I've left in their
6 format as the image started when I received it, downloading it
7 on the internet, and even staring at this as long as a person
8 wants to stare at it, it's impossible to detect all of the
9 alterations and be able to determine whether something belongs
10 there or doesn't belong there, et cetera. For example, your
11 eye quadrants might be drawn to quadrants 1, 4 and 6 because
12 they have different color than other quadrants, but there's
13 nothing about this image to tell you if those three quadrants
14 are the color of the starting image or is it the other
15 quadrants which appear to be more black and white instead of
16 sepia-toned are the original -- is the starting image the way
17 it laid out. And when I click off that first layer I now have
18 lines going to each one of the quadrants demonstrating what was
19 removed and you can read those and starting with quadrant
20 number 1, I changed the color and those other two sepia-toned
21 quadrants, I just altered them in Photoshop. I changed the
22 contrast in the upper right-hand corner. I removed the tie off
23 of the sailor who is depicted in the third quadrant there, and
24 then I changed the brightness ever so slightly in quadrant
25 number 5. I removed some white specks in the lower left-hand

1 quadrant. And the only quadrant that was unchanged from the
2 starting image is the number 8 in the lower right-hand corner.

3 Q. Are you able with this software to do that to virtually
4 any photograph that becomes a digital image?

5 A. Yes. The techniques I'm applying apply to any digital
6 image.

7 Q. Number 6 please?

8 A. Number 6 is the only exhibit as a starting image that I
9 can tell you is a real image.

10 Q. Why is that?

11 A. Because I captured this image with my digital camera last
12 summer while my daughter's soccer team was playing soccer
13 outdoors.

14 Q. Is it a fair statement to say that the only person who
15 could say that an image is the starting image or can testify to
16 its authenticity, if you will, would be a person who
17 participated in the creation of that image?

18 A. That's correct. And that's why this other Exhibit 35 I
19 brought to you today, because if I were presented with that
20 magazine and asked to give an expert opinion as to whether
21 those images of those two individuals on the cover of that
22 magazine were altered or not, had I decided I was going to just
23 eyeball it and say no, there's been no alteration, I would have
24 been tricked as well. That's why I don't enter into the area
25 of guessing about other people's digital images, whether

1 they're unaltered, altered, whether those people exist or not,
2 because unless I participated in the creation of the image, I
3 don't know.

4 Q. Okay. What do we have with number 6?

5 A. Okay. What we have here is what your eye is telling you
6 is several the several players, one about to kick a ball, and
7 the reality is the right most player was inserted by me. And
8 that player is actually, now that I point it out you will
9 probably notice, is actually a copy of the left most player
10 whose entire body is seen in the scene, seen in the image. I
11 copied her body, moved it over to the other side of the image,
12 cut off her leg, which is kicked back behind her, and moved it
13 down toward the grass.

14 Now analyzing this image, another thing that you will
15 notice is there is no shadow underneath that other player,
16 something that might not necessarily be evident to
17 non-photographic expert, the just regular user who downloaded
18 this off the internet, but now that you can see, we have
19 sunlight coming and creating shadows on all the rest of these
20 players but not this player I inserted.

21 Next what you'll see if you look in the for foreground
22 is the grass.

23 Q. Pardon me. Could you have created a shadow with that
24 person?

25 A. Oh, absolutely. I could copy the shadow that was existing

1 in the image. Here, I'll do it right now. I'm using one of
2 the many, what they call selection tools. I just select an
3 existing shadow that is coming off of one of the other players.
4 I'll copy that shadow and now we have another layer with that
5 shadow in it. And as you can see, you'll see I'm dragging with
6 a appears to be grass and a shadow and I just set it on the
7 edge of her foot. And what your eye now tells you is that's
8 shadow behind her.

9 Q. And if that particular shadow that you dragged over was
10 too long or too short, you could easily lengthen or shorten it?

11 A. Yes there's, again, myriad tools to do that. I now have
12 that shadow captured in a selection box, I've made it shorter,
13 and I could actually select it and make it much longer. It
14 doesn't matter, I could make it wider change the size of it. I
15 can alter it to any shape I want.

16 Q. What else is significant about number 6?

17 A. Well, what's significant about number 6 is that while if
18 you look in the foreground the entire foreground of grass that
19 you're viewing is not the grass that was in the original image.
20 I copied and pasted other pieces of grass and painted over.
21 You can faintly see the outline of the soccer field, white
22 lines that border the field. And then lastly what the your eye
23 might not have even told you yet, is that when I click off that
24 final image the entire background up above and behind these
25 players was inserted by me. What you're now looking at, the

1 lowest layer of this image is the actual unaltered digital

2 image I captured with my camera.

3 Q. And I take it you can erase all of the foliage, add more

4 foliage, change the color of the grass from green to dormant as

5 you choose?

6 A. Yes. And one other thing I wanted to point out is that as

7 I'm switching between the second most, second to the last layer

8 and the final layer, which is of the actual image, you will

9 notice another player comes into the scene who is attempting to

10 kick this ball at the same time as player number 4 is. And

11 this is one of the things about, that's risky about individuals

12 attempting to visually examine an image and determine whether

13 it's been altered or not. If you look carefully at this player

14 who is about to kick the ball, her back is unusually straight

15 in that image which might tell a digital imaging expert, hmm,

16 that could be an altered image because people's backs are not

17 that straight, she was cut and pasted out of another image.

18 But what you're looking at is the light, the settings on my

19 camera, the way I took that picture, that how she looks. That

20 is an actual unaltered image but yet to your eye appears

21 altered. And that's the trick of trying to do this with your

22 eyes. It's just not reliable.

23 Q. It appears as though we jump from number 6 to number 8.

24 Is there a number 7?

25 A. No, there isn't. My mistake there.

1 Q. Okay. Let's go to number 8.

2 MR. SMALLWOOD: I would ask the record reflect there
3 is no Defendant's Exhibit No. 7 in Defendant's Exhibit 33.

4 Q. (By Mr. Smallwood) Number 8 please.

5 A. This is Exhibit No. 8 is just designed to show the
6 filters, some of the filters in Photoshop. You can take an
7 existing digital image and then apply various filters to it.
8 And what you're looking at here doesn't even appear to be a
9 photograph or a digital at all in the sense of a photograph
10 that was scanned in. It could well have been a painting or
11 some other piece of art out of someone's imagination. Here's
12 another version of it which makes it look like it's almost a
13 plaster cast of a female body. The next is applying a filter
14 which makes it appear like a female body behind a piece of
15 glass, some sort of window or divider. The next makes
16 individual look like their body has been created plaster and it
17 has a bright light coming from one direction which was not
18 present in the previous versions. And then finally here this
19 makes the individual's body perhaps having been photocopied
20 from some print publication or taken from a movie still, a
21 image taken out of a movie. And then finally this is the
22 starting image that I began with to make all of those filter
23 alterations. So that just shows you some of the power of the
24 tools in Photoshop to transfer what appears to be a real
25 person, an actual image of a person into something that looks

1 like artwork.

2 Q. Let's take number 9 and number 10 together, Mr. Boland.

3 What are those?

4 A. Okay. Number 9 and 10 are alterations I made to a now

5 famous image of Janet Jackson and her wardrobe error.

6 Q. Malfunction.

7 A. Her malfunction. And let me show you Defendant's Exhibit

8 10. And when you look at this image, what's not apparent to

9 the viewer, obviously, are a whole host of alterations which

10 were made to the digital image I downloaded. For example, now

11 that I'm clicking this first layer, you'll notice a piece of

12 hair from the left side -- I'm sorry, the right side of the

13 image disappears. And now that I've pointed it out, if you

14 look carefully you can where I got that hair from. It's

15 exactly from this side of the image, the left side. I copied a

16 piece of her existing hair and just painted it over the -- and

17 just copied it over to the other side of the image.

18 In addition, there's another piece of hair that your

19 eye didn't notice 'til I just clicked it off, that's going down

20 the right of the image. And in fact, what appears to be her

21 left breast on the right side of the image, is not in fact real

22 at all. That was copied from the other side of the image and

23 pasted there. The right covering over her right breast on the

24 left side of the image was merely copied from the left side and

25 moved over. I'll show you how I moved that. You can now see

1 I'm moving that covering which was over where her breast was
2 exposed, and if you look carefully this covering is an
3 identical, symmetrical match to the covering on the right side
4 of her body and that's because I just copied the right side,
5 flipped it around and moved it. I'll flip it back to show you.

6 Now you can see, I've put them below each other, the
7 right-hand side of the image which her breast appears to be
8 covered, I just copied that identical breast plate or breast
9 covering, whatever it's called and then turned it, moved it to
10 the other side of the image, raised it up slightly so your eye
11 doesn't see the symmetry and then made it look like that was
12 the starting image, which of course it wasn't.

13 And then finally her hands, which you wouldn't have
14 noticed 'til now, are actually in a different position than the
15 image I started with and what you are looking with now is the
16 starting image.

17 So I was able to cover her breast, move her breast,
18 change her arms, add hair, do all kinds of manipulations that
19 are not going to be detectable to the next using user.

20 Q. Defendant's Exhibit No. 11.

21 A. Number 11 demonstrates -- this is an image I downloaded
22 again from a stock photo web site. The female you see depicted
23 there is obviously, to your eye, just copied in three different
24 places. The -- what this demonstrates is that even taking
25 objects out of the same image, it's impossible to, for an

1 expert much less an average user, to say which one of those is
2 the quote/unquote "original one." Which one of these images of
3 this female were in that location with the starting image. And
4 if you tried to pick one of them, you would even be further
5 fooled because the actual starting image is this one. None of
6 those three in the image that you saw, that I altered, were in
7 fact where that female was in the image I started with. She
8 was copied and moved everywhere.

9 Q. This is the image you started with?

10 A. I started with this image, and what you're looking at now
11 is the image that I've altered. So for someone to come into
12 that image and say okay, I can tell you to a reasonable degree
13 of scientific certainty that the middle model is the real one
14 and the other two are copies, it's just not possible for them
15 to do so, because what they wouldn't have known is that none of
16 those are the ones that I started with. That's the one I
17 started with, far off to the right.

18 Q. It doesn't appear that we have a No. 12.

19 MR. SMALLWOOD: I would ask that the record reflect
20 that there is no Defendant's Exhibit No. 12

21 Q. (By Mr. Smallwood) I ask you to look at No. 13.

22 A. 13 was designed to look like a mock-up of a child porn web
23 site that was trying to encourage individuals to see this
24 image, click on some icon on that image to perhaps download it
25 or subscribe. And what this image appears to be is, or what it

1 claims to be is a minor named Lena, under age six, engaged in a
2 sex act some male whose body off the side of the image. The
3 reality is no such thing. I started with this image, which was
4 downloaded off the internet, of what appears to be a male penis
5 coming in from the left side of the image and then juxtaposed
6 it with this image downloaded off the internet, which appears
7 to be a minor eating a doughnut.

8 Neither one of these images did I create, so I don't
9 know if it's really a minor eating a doughnut. It just that's
10 what it appeared to me when I downloaded it off the internet.
11 That was Exhibit 13.

12 Q. And how much time did it take you had to create that?

13 A. That one probably took me about 20 minutes, 25 minutes to
14 create.

15 Q. Okay. Where is your skill level, in your opinion, of 10
16 being the best in the world, one being -- or zero being me?
17 Where would your skill level be?

18 A. I'm probably a five or six at this point in Photoshop.
19 And I'll tell you why. I bet you there's nobody who will
20 declare themselves a ten, because this software is designed to
21 serve an entire market full of needs. There are people who
22 will spend their entire career and they will spend it just in a
23 few sections of the Photoshop software and that's all they are
24 really going to need to use. And others will spend it in a
25 different section and won't really have familiarity with the

1 rest.

2 So to get to a ten, like the individual who wrote that
3 Photoshop bible, is probably something that's not practical for
4 the overwhelming majority of users, because they are using this
5 to earn a living in a specific area of art or media.

6 Q. And the applications of this software are so enormous it
7 would be extremely difficult for one person to be a -- a 10
8 expert on -- in everything?

9 A. That's correct, but it's extremely easy for you to be an
10 expert in small chunks of the software, because using it
11 repetitively over a few days you will obtain the skills you
12 need to do those kinds of alterations.

13 Q. Okay. No. 14, please.

14 A. Defense Exhibit 14 appears is made to appear as if it's a
15 minor with a collar around her neck that says the word slave
16 and there's an indication at the bottom of the image that this
17 image comes from a web site called slave minors dot com. The
18 reality is just like images -- any other image you'd see on the
19 internet, you can't trust that the words that are across the
20 bottom of that image were put there by the person who is
21 sending you the image, or the place you are downloading the
22 image from. I inserted those words across the bottom. I, in
23 fact, inserted the face into this image and now you see a color
24 version of what appears to be a minor underneath these two men.
25 And what you'll find is, now you are looking at the starting

1 image one, which appears to be a minor just sort of yelling
2 into the camera with some snow in the background.

3 And then finally, starting image two, which is an
4 apparent adult female with a totally different look on her
5 face, and her breasts are of a larger size than the initial
6 black and white image that you're seeing now.

7 Q. And would appears to be sexually mature --

8 A. Exactly and there's just a few changes that need to be
9 made by painting right on the image, that will cause the breast
10 size to be reduced to what appears to be a prepubescent
11 flat-chested female.

12 Q. Can you do that for us?

13 A. Yes. Let me copy this image, copy this layer and I'll
14 show you how that's done.

15 One of the other tools in Photoshop of this version
16 and the previous version is called a healing brush and you just
17 click along the outline of this woman's breast a few times and
18 it begins to eliminate the apparent shadows which make her
19 breasts seem large and developed. And after a few strokes of
20 doing this, you now notice that what appears to be a breast
21 that's coming up out of her chest as if it's a developed breast
22 is now shrinking into her chest, or appears to be, and becoming
23 flatter and flatter as we go.

24 And then the other change that could be made is the
25 selection of both of the apparent nipples in this image and

1 then just reduce the contrast of those down so they are not so
2 dark brown which would indicate an adult female and make them
3 lighter in color which would indicate a prepubescent or under
4 age 18 female.

5 Q. Can that be done?

6 A. Yes. So now I'm just selecting an area roughly around
7 where this adult, apparent adult female has that nipple and
8 then selecting around this one. And then there's a function
9 called levels in Photoshop. And as I move this slider you will
10 notice that the color begins to get faint. I just moved it
11 just a touch and when I select off of that, you now see that
12 the nipples have gotten more faint, they are not as dark brown
13 color indicating an adult female. They are starting to
14 indicate under age 18 or some person whose has just hit
15 puberty.

16 Q. And if anybody, from the work that you just did, could
17 determine some sort of imperfection there, that easily by
18 spending more time, a little more time, it could be completely
19 eliminated by you?

20 A. Absolutely. And as I mentioned, determining an alteration
21 doesn't mean a fake image anyhow. There's a tool here, for
22 example, this smudging tool, and if I just take it across this
23 image and do something like this and smudge that, now to your
24 eye something looks wrong with that image. It clearly looks
25 altered, but that is still that female and that's still her

1 body that I started with in that image and still those
2 individuals hovering over her. An alteration has been made
3 that's obvious to anyone and yet, you can't say the image isn't
4 real. It's still the starting image with that smearing that's
5 been put over the top of it.

6 Q. Okay.

7 A. So even a bad fake, let's say, on the internet, where you
8 say to yourself I can clearly see, in my opinion, that this is
9 a child's head put on an adult's body, that doesn't mean
10 anything as far as determining whether it's an actual minor or
11 not, because you can alter the image to appear to be fake and
12 trick the person into thinking that what they are not-- what
13 they are looking at is fake.

14 Q. Number 15, please.

15 A. 15 is a use of a collage of images. What -- the words
16 along the top indicate "Britney Spears Outdoor Blowjob." The
17 reality is, this is a very, quite famous image of Britney
18 Spears that I -- now here's a color version of it, there's the
19 text removed. And I started with this image which appears to
20 be Britney Spears and Madonna at an award show doing some
21 performance where, and it was it was well publicized in the
22 media, they both stopped in the middle of the performance and
23 participated in an open mouth kiss with each other. And just
24 using that image and going over this starting image, which is a
25 different person, in the park, apparently involved in sexual

1 activity with an adult male, and just overlaid Britney Spear's
2 face right into that image, to make it appears as if it's her.

3 Q. And you could have taken the-- well, we'll get to that.

4 Number 16, please?

5 A. Number 16 is using an image that's on, pretty much
6 everyone's computer who is in the room here, and that is
7 desktop wallpaper image that ships with Windows, and the point
8 of this is to demonstrate the ability to make reflections and
9 color changes. Again, this appears to be nearby a body of
10 water with leaves and trees in the background and the reality
11 is that the divider I put in there that's very subtle, that
12 tricks your eye into thinking there's a boarder between water
13 and land is nonexistent, and the image is actually more
14 brightly colored, and the reflection was a copy of the lower
15 portion of the image. And what we're seeing now is the
16 starting image that I just took out of the Windows operating
17 system.

18 Q. Okay, number 17, please.

19 A. 17 demonstrates that the ability to apply one of the many
20 filters in Photoshop called a stamp filter, which disables you
21 from looking at this image in determining if this is a drawing
22 out of someone's imagination, or if this is an actual digital
23 image of a real person that had a filter applied to it.

24 So when you back off the image, what you will see is,
25 now this version is a poster filter, which makes the image

1 appear, again, not necessarily a photograph or a digital image
2 that was altered, but maybe someone who drew something to make
3 it look like a poster. And then next, you will notice this is
4 what appears to be the digital image of a minor under the age
5 18, engaged in sexual activity, relatively flat-chested,
6 nipples are sort of a peach color as opposed to developed ones,
7 and notice her hips all of a sudden get wider when the next
8 layer appears. And you are able to recreate the folds in these
9 sheets and things that are on the bed quite easily by copying
10 other sections. And then finally, you're still not looking at
11 the starting image, now you're looking at the starting image,
12 which has apparently fully developed breasts and you can see
13 some hint of pubic hair in the lower area. In addition, her
14 hair is actually blond in the starting image and it goes down
15 around her shoulder, whereas in the altered image there is no
16 hint of that all and she appears a brown-haired female.

17 Q. About how long did it take you create this?

18 A. That one probably, again, about 45 minutes, half hour,
19 somewhere in that range.

20 Q. Okay number 18, please?

21 THE COURT: Mr. Smallwood, why don't we stop here, if
22 we could, and then we will take our break for lunch at this
23 time.

24 MR. SMALLWOOD: Very well, Judge.

25 THE COURT: I'm to be at the Clerk's Office barbecue

1 down at 12:15 with an out-of-town guest who is with us. So why
2 don't we break at this time and we'll come back at -- why don't
3 we come back at 10 minutes after 1:00, does that work for
4 everybody?

5 MR. SMALLWOOD: That's fine, Judge. Do you-- is it
6 your custom to lock your courtroom?

7 THE COURT: We will if that--

8 MR. SMALLWOOD: I would prefer that it remain
9 unlocked.

10 THE COURT: All right, we'll secure the courtroom
11 then, once everybody has vacated it. All right.

12 Anything else before we break on behalf of the United
13 States, Mr. Greer?

14 MR. GREER: No, Your Honor.

15 THE COURT: Mr. Smallwood, anything?

16 MR. SMALLWOOD: No, sir.

17 THE COURT: All right. We'll come back at 10 minutes
18 after one. We'll be in recess.

19 (Recess).

20 THE COURT: Please be seated. I apologize for
21 starting late, but I was trying to get them to redraw the
22 winners at the barbecue, but they said something about
23 principles of fairness that I didn't fully understand or
24 appreciate.

25 In any event, Mr. Smallwood, you may continue your

1 examination, sir.

2 MR. SMALLWOOD: Thank you.

3 Q. (By Mr. Smallwood) Mr. Boland, do you understand you are
4 still on the witness stand and you are still under oath?

5 A. Yes, I do.

6 Q. I believe we finished with Defendant's Exhibit No. 17,
7 would you go to Defendant's Exhibit No. 18?

8 A. Yes. 18 in the first frame that you're seeing here, the
9 first layer, again, appears to be something that could be on a
10 web site enticing someone to call and perhaps have an internet
11 phone conversation with a 13-year-old hottie, as is written
12 across the front of this image of what appears to be a minor
13 reclining back without her clothes on and her legs spread, and
14 there's even a web site address at the bottom encouraging
15 people to go there to have a conversation with her.

16 Q. Who created those docu -- those im -- those words?

17 A. Those words were put on the image by me. In fact, I'm
18 going to click off the first layer and it's actually, the
19 starting image was color, as opposed to black and white, and
20 just a simple alteration in Photoshop converts any color image
21 to black and white instantly.

22 In addition, the words you see across the bottom and
23 the middle were inserted by me. And in fact, what you're going
24 to notice now is if you look carefully at the eyes of this
25 apparent minor, they just opened. So through Photoshop I was

1 able to paint over where her eyes are and undetectable to your
2 eye, it looks like she is reclining with her eyes closed.
3 Actually, the starting image is what appears to be eyes open.
4 And then now you see the last layer is the image I started
5 with. Obvious pubic hair in the lower region of her body and
6 large, larger fully developed breast of an apparent adult or
7 close to an adult.

8 And also, here is an example of what can be done in
9 Photoshop. This is a version where I simply shortened her
10 torso by scaling the image from left to right, which then
11 again, makes her appear to be a shorter person, which is
12 indicative of a minor as opposed to a taller person who would
13 be an adult.

14 Q. Can you give an example of further software applications
15 which would change the body proportions?

16 A. I don't understand your question.

17 Q. Such as hips, or breasts, or...

18 A. Yes, the scaling can be done just the way I demonstrated
19 on one of the previous examples, where you select an object and
20 then can squeeze it in and out.

21 I'll do a rough example here of how you can make her
22 hips appear to be more narrow. You simply would take a
23 selection of, perhaps at this point where her leg meets her
24 hip, try and round it off in this fashion and then when you
25 select that area, you choose from a nearby area of these

1 apparent sheets, you select that area and then just go painting
2 right through your selection point. Now I've done this kind of
3 quickly, so you're going to see sort of a chunk out of her leg.
4 But as you can see, you begin to make her hips narrower and
5 then if you smooth, smooth these areas out, you can start
6 seeing that it begins to give you the illusion that it's a more
7 narrow hipped female as opposed to the one that was there
8 before.

9 Q. So, with spending 15, 20 minutes, half an hour, whatever
10 was necessary, you could take what I might describe as a busty,
11 robust, obviously adult female, with wider hips and larger
12 breasts and change those proportions anyway you saw fit?

13 A. Yes, and obviously for a person who is trying to trick
14 people on the internet, or wherever, that what they are looking
15 at is the image of a minor, they would do those things that
16 would make the image appear to be a younger person, so the
17 examples you gave would be appropriate.

18 Q. Would you go to Defendant's Exhibit No. 19, please.

19 A. No. 19 is just to show how quickly some of these
20 alterations can be made. The alteration you're going to see
21 here to this apparent female took me not more than 10 minutes.
22 And you're looking at the altered image and here's the starting
23 image. So what you see appearing when I click on the starting
24 image is not only a pair of sunglasses in her hair, which were
25 totally absent from the altered image, but her breast size now

1 appears to be that of an adult. And in addition, if you look
2 carefully at the bottom of the image, her hips have -- are
3 narrow here and they've widened, now giving the impression that
4 this is a post-pubescent female who has widened hips, as
5 opposed to a simple alteration now makes her look like her hips
6 are almost going straight down as if she's prepubescent.

7 So it's very easy and fast to make those kind of quick
8 alterations.

9 Q. Okay, go to number 20, please.

10 A. Number 20 has text written across the bottom of it that
11 says real girls young porn dot net.

12 Q. And you put that on there?

13 A. No, actually I didn't. And that's the point of using this
14 image is compared to the other ones I have demonstrated, you
15 don't know until I tell you, did I add that text or was it
16 added in the image that I started with. This happened to be in
17 the image that I started with. And it's not a black and white
18 image, it's actually color, as well as, what appears to be a
19 relatively flat-chested, pigtailed girl who could be a minor.
20 This starting image has a female with fully developed breasts
21 posing in that fashion.

22 Q. Number 22, please.

23 A. Number 22 is another sort of more detailed example of what
24 can be passed off as an exhibit from a criminal action against
25 some individual accused of possessing child porn. It has some

1 fake case information. It claims that this person's name is
2 Mindy Smith, age 8, et cetera. And as you would assume, all of
3 that text was inserted by me into the bottom of that image and
4 in fact the starting image, you'll probably recognize as one of
5 the ones that used in a prior creation.

6 Q. With the snow in the background?

7 A. Correct. So her face is there and the actual starting
8 image that was the adult porn image is this one. So merely by
9 editing this existing image of a minor, and then inserting it
10 into this image and putting some text at the bottom, you begin
11 to -- and now I've added another level which shows even a
12 defendant's exhibit sticker to make it even more realistic that
13 this was from a criminal matter. In fact, it's the same color
14 blue as the stickers that are on the exhibits sitting next to
15 me. And I just grabbed a digitized legal document off the
16 internet which had a defendant's exhibit sticker on it and then
17 I just cut it and pasted it right onto this digital image.

18 Q. Okay, No. 23, please.

19 A. Now this is an example of not superimposing a minor's face
20 into an adult body, but taking, what you're going to discover
21 its, first of all, it's a color image, it's not black and white
22 as it started. But this is the top half of what appears to be
23 a minor's body that is super -- and this is the starting image
24 that I worked with to get the resulting image you see here and
25 it's superimposed over what clearly appears to be an adult

1 female in the lower half of her body. So there, too, if you
2 will, unaltered images that are then placed together to give
3 the appearance of a person who doesn't exist. A minor such as
4 this, with this individual, a male, in the image interacting
5 with her doesn't exist. It's just the superimposing of a minor
6 on top of an adult's body.

7 Q. Okay, number 24, please.

8 A. The stock photo web site I downloaded this from, the
9 individual who created this claimed that it was a digitally
10 painted upper half of a female body. Now --

11 Q. Not an actual human body at all?

12 A. Right, that was their claim, that this was some photo-
13 realistic painting they had done. And when you edit this,
14 first that blue cast is not the starting image. The starting
15 image is not even this version here, it's actually the one you
16 are looking at now.

17 So with a few clicks of the mouse, you can obscure
18 what appears to be a digitally painted upper half of a female
19 body and make it look now like it's a photograph in a dark
20 room.

21 Q. Okay, Number 26, please.

22 A. This image was presented demonstrate how many things in an
23 image that your eye will tell you are not, don't belong in the
24 image, how many were altered and how many weren't. And what
25 your eye might tell you is that both the car label and the line

1 across the car look like they don't belong. But what your eye
2 can't possibly recognize is, if you notice in this upper
3 right-hand corner, you'll notice the tint on that wood of that
4 house is going to change. It gets slightly more green. And
5 now more dramatically, look in the center section here, the
6 color has gone from a pale brown tan to a bright fire engine
7 red. And then finally, the white car you are looking at is not
8 actually colored white, in the starting it was yellow.

9 And this is -- these are very simple changes to make,
10 changing the color of virtually any object in the image in such
11 a way that, again, you looking at it without me telling you,
12 those things would be undetectable.

13 Q. But you could make those same changes on eye color?

14 A. Yes.

15 Q. Put fingernail polish on a person's fingernails?

16 A. Easily, yes. It's a matter of taking the time to select
17 around those portions of the image and you can recolor them
18 whatever color you'd like.

19 Q. Okay, number 27, please.

20 A. This was used to demonstrate the ability -- and there's,
21 by the way, thousands of tutorials around the internet that
22 people put up for the benefit of the Photoshop community, I
23 suppose, on how to do all kinds of alterations I'm
24 demonstrating today and even more, and one of them that's very
25 popular is how to remove or insert what appears to be blood

1 into an image.

2 So the image you're seeing now is the one I started
3 with, with an abrasion and some blood apparently transferred to
4 a piece of cloth below this persons's elbow. And with probably
5 about 7 or 10 minutes of alterations, all evidence of that
6 blood is eliminated.

7 Q. Okay. Number 28, please.

8 A. This image here is completely -- this is the image the way
9 I downloaded it, and what it appears to be is a severe injury
10 to an individual's arm connected with war, and the reality is
11 when I click off white portion they put at the bottom, this was
12 downloaded from CNN's web site, connected with a story about
13 how makeup artists in Hollywood make realistic injuries using
14 makeup for Hollywood movies.

15 Q. Okay. Number 29, please.

16 A. Now, this image is used to demonstrate, again, how you can
17 leave all the composition in the image the way it was. The
18 lighting, the shadows, the expressions on this individual's
19 face have been unaltered, so if they were real in the initial
20 digital image, they are utterly real now. And all I've done --

21 Q. And vice versa. If they were unreal, they are unreal now?

22 A. Exactly. So this person who now appears to be posing
23 topless in somewhat of a wooded area, I didn't alter a single
24 thing about the lighting, the shadows, et cetera, on this
25 image, and yet what you're looking at is not a girl who is

1 14-years-old, but the reality is you're looking at, this is the
2 starting image, or almost the starting image, and now if you
3 notice this female's right breast has just protruded outside,
4 out of the left side of the image. And then finally, we have
5 the starting image with an obviously, fully developed female
6 breast, large, dark colored nipple, et cetera, which is not
7 indicative of a minor as opposed to what the image, modified
8 image, appears to be, which is that of a topless minor posing,
9 in this scenario.

10 Q. Number 30, please.

11 A. This image, again, appears to be Dakota, age 13, posing
12 naked in front of the camera or at least topless with a date of
13 March 25th, 2004. That data was inserted by me. However, the
14 yellow print in the upper left and lower right-hand corner of
15 the image was in the starting image. In addition, the
16 background you see there is also different. The pattern
17 background you see behind this apparently half naked minor was
18 actually inserted by me. The background in the starting image
19 is this plain red background that you see now. And in fact,
20 the starting image is the one you're looking at now where this
21 apparent minor is completely clothed. And why this is
22 different than the other images is because the content that was
23 used to give the viewer the impression that it was an under-
24 developed minor who was topless, is actually this image you're
25 now seeing in front which is -- I didn't alter this apparent

1 adult female's breast at all. She happens to be a somewhat
2 flat-chested, more so than the other ones you've seen, adult.
3 I merely took the image of her breasts from this image you see
4 here, didn't retouch them at all, and pasted them into the
5 image of the minor.

6 So, you have an apparent adult whose body parts are
7 just merely superimposed over a minor, and now your eye tells
8 you that's the chest of a minor and the breasts of a minor,
9 when it isn't. Those are the breasts of adult that are
10 superimposed here and trick your eye into thinking it's a
11 minor.

12 Q. Number 31, please.

13 A. This is an example, upon first look it appears to be a
14 scan of a print photograph with a paper clip in the corner of
15 this minor female standing up in front of a couch in a room
16 somewhere. The real -- in fact this is one of -- you can
17 execute the same steps I did that are in the tutorial that's in
18 Defendant's Exhibit 37. There is a tutorial specifically in
19 that, it just so happens in that version of Photoshop magazine
20 which teaches you how to take a digital image and convert it to
21 look like a scan of a print photograph.

22 And now, as I move down the levels here, you now see a
23 different version of this female that has what appears to be a
24 swimsuit on, a one piece bathing suit. And the reality is
25 again, that that's not even the starting image. We now have a

1 color version of that image of an apparent minor female with a
2 swimsuit on and as we remove that, you will see now we have a
3 version with light coming in from an apparent bad use of flash
4 in the photography.

5 Q. In an effort to try to convey the impression that this is
6 a photograph?

7 A. Exactly. And then now we have that flash is removed. And
8 now we have it converted to a drawing, which obviously the user
9 who comes across this image would not be able to know that
10 that's a drawing. They would have to guess whether it's a
11 photograph that has been altered in Photoshop, or a drawing
12 that was made from someone's imagination. And now you see the
13 starting image, obvious pubic hair in the lower region of her
14 body, an obviously fully developed female adult breast, as
15 opposed to -- and I'll click back -- the starting image which
16 I've just superimposed, which now looks like a print that was
17 scanned in of a minor posing in front of a couch.

18 And then, where I got the paper clip from was this
19 image you see here, I simply found this on the internet, took
20 that paper clip and then copied it into this image that you see
21 here, right in the corner. Which leads your eye to believe
22 that there's a paper clip there. And then the swimsuit, as you
23 can see, is just taken off of a retail manufacturer web site
24 and then I just cut that swimsuit out and pasted it right over
25 the other image that I have.

1 Q. There is not an Exhibit No. 32 on our compilation,
2 Defendant's Exhibit No. 33, but you do have an Exhibit No. 32.
3 Would you click to that, please.

4 A. Yes, I spent about a half hour last night and created an
5 exhibit which again appears to be a print photograph that's
6 been stapled to a piece of wood. And you see the staple there
7 and what you really have is not a print photograph nailed,
8 stapled to a piece of wood. It's actually just this image I'm
9 about to show you, that I started with, that I've copied
10 several times. There it is, that single image with an apparent
11 staple between two pieces of wood and then what I did was just
12 copied it over and over again and made that pattern that you
13 see there. I altered some portions of the pattern that are not
14 covered by the image so that your eye wouldn't immediately see
15 it as a repeating pattern and then I just threw a shadow
16 underneath it to give the appearance of depth. So now what you
17 appear to see is someone who has, either with a digital camera
18 or regular camera, photographed an image that was stapled to a
19 piece of wood, when in fact none of that actually exists. That
20 starting image was a flat digital image that was just
21 downloaded off the internet.

22 MR. SMALLWOOD: Your Honor, subject to
23 cross-examination we would offer Defendant's Exhibits 1 through
24 33 with the deletions, which I believe there is no 7, 12 -- 7
25 or 12, Your Honor.

1 THE COURT: All right. Without objection they will be
2 admitted.

3 Q. (By Mr. Smallwood) Mr. Boland, with respect to how a
4 viewer of digital images might gain some sort of knowledge from
5 the content of an image, do file names, web site addresses,
6 come-ons, advertisements, anything of that nature, add anything
7 or give a viewer of these type of images any reason to believe
8 or know what's contained on the internet?

9 A. No, they don't. File names I'll take first. File names
10 are completely arbitrary. I can take a file, any one of the
11 images I created, any document that I've drafted, a letter, et
12 cetera, and at will, I can alter the name of that file as many
13 times as I'd like. So if I were to send you a document that
14 says nuclear secrets dot D-O-C, that has no connection to
15 whether that document actually contains nuclear secrets. There
16 is no technological rule that a file name has to be named based
17 on its contents.

18 So, even Defendant's Exhibit 40, the Government's
19 report, acknowledges the fact that they have a bunch of file
20 names related to the images that they claim match in this
21 database from the computer of the defendant and even with that
22 information, they have the file name, they've looked at the
23 image, they agree with what I just said, that they can't verify
24 that that's an actual minor or her age even with that
25 information. So I think it's not really in dispute with

1 experts on either side of that issue.

2 Q. In the course of conducting your investigation and
3 creating these exhibits, did you locate a quote/unquote "child
4 porn site", that turned out to be exactly the opposite?

5 A. Yes, in fact -- I don't happen to be connected to the
6 internet right now, but the reality is if you were to type in
7 the web address child porn dot com, what you would find is a
8 coalition of adult entertainment companies that have -- are
9 using that web site to combat child porn.

10 In addition, there's sites like whitehouse dot com
11 which would lead the unknowing user to believe that they are
12 going to get information about the president and the White
13 House, et cetera, but at whitehouse dot com is one of the
14 highest rated and most frequently visited adult porn web sites
15 on the internet. And the list pretty much goes on and on. The
16 number one auction site on the internet is not auctions dot
17 com, it's ebay, which is not even an English word and has no
18 connection to the content of the site which is auctions.

19 So web site addresses do not add anything to a
20 person's knowledge as to whether they're downloading an image
21 that is -- contains a real minor or doesn't contain a real
22 minor, the web site address simply doesn't provide anything,
23 even if the site was called actual child porn images dot com,
24 it's irrelevant because you can name a site whatever you want.

25 Q. Are you aware of any representations made by the United

1 States Government as to web sites in and effort to inform the
2 public of how unreliable representations or names are on the
3 internet?

4 A. Yes. In preparing for my testimony in the prior cases,
5 and I'll mention it again here, I came across several articles,
6 one of which was by the SEC and they created a fake company
7 called McWhortle Enterprises, created a web site for the
8 company specifically to lure people to attempt to invest in
9 that company and when they tried to invest, the SEC would send
10 them an e-mail and say, we just set this up to warn you, don't
11 believe what you see on web sites, don't believe the domain
12 names, you were fooled by the content of our site so we're just
13 trying to, as a public service, let you know, don't go around
14 believing what see on a web site.

15 So they recognize that anyone who relies on a web site
16 address for that dictating what the content is would be
17 foolish.

18 Q. You are in receipt, Mr. Boland, are you not, of Judge
19 Holmes' order of April 12th, 2004, you either received it that
20 day or the next day?

21 A. I did, yes.

22 Q. And you are aware of what the Judge has asked us to
23 address in that order?

24 A. Yes.

25 Q. And a part of what the Judge asked to us address is the

1 issues raised by the Marchan case or Marchand case. Are you
2 likewise familiar with the Marchand case?

3 A. I am.

4 Q. I believe we need to go to our Defendant Exhibit 29, if
5 you would, again.

6 With respect to Judge Holmes' order of April 12th and
7 the Marchand case, do you have any testimony relevant from this
8 exhibit.

9 A. Yes, the technology that was referred to in that opinion,
10 the Court relied upon the fact that lighting and shadows and
11 expressions in the images they viewed with their eyes, were in
12 their minds utterly real. And this one exhibit alone
13 demonstrates to you that you can have an image with lighting
14 and shadows and in fact an expression that is utterly real and
15 yet it's obviously, according to the Free Speech Coalition
16 definition of virtual child pornography, it's clearly not an
17 actual minor and it's not the product of the sexual abuse of a
18 minor. It's an adult whose body has been very easily changed
19 to appear to be a minor. So all the factors that were present
20 in Marchand that they were relying on to say we can tell these
21 are real images, they are present in this image and yet it's
22 not an actual minor.

23 Q. Is the software referenced in the Marchand case the same
24 software that you've been using for this presentation?

25 A. No, that's a completely different classification of

1 software. And I agree with Detective Holloway, that the type
2 of software that Hollywood uses and video game manufacturers
3 use to create the different individuals in the football games
4 that they have or the adventure games, that software is not
5 anywhere near having the ability to fool even the average user
6 that what they've created on a completely blank screen is in
7 fact a real person. Namely, hair and skin tones are, they
8 haven't been able to recreate those such that you wouldn't be
9 fooled. However, that's just one mechanism by which you can
10 create virtual child pornography. So as to Marchand talking
11 about that, I don't have any expertise in that, that particular
12 software or any versions of it, but I'm well versed enough to
13 know that I would agree, and I've agreed in my prior testimony,
14 that that kind of software can't create realistic human beings
15 from scratch on a blank screen. But as you see here, that's
16 not what I'm doing.

17 Q. Are you -- is there anything in the Marchand case that
18 indicates that there was any presentation of expert testimony
19 with respect to the Photoshop software that you've used here?

20 A. No, there was nothing in there regarding this software or
21 in any of the other cases that are similarly found that juries
22 can decide this, or that the technology hasn't reached that
23 level, there's never been any expert testimony using Photoshop
24 in a case I've ever read.

25 Q. Do you consider yourself fairly well up to speed on these

1 cases over the country?

2 A. Absolutely, I've had to have been because I've testified
3 in three prior cases in the last five weeks. So I've been
4 reading them constantly to see if there's been an opinion
5 either way that's come out in preparation for my testimony.

6 Q. Is there anyway that any citizen, including an expert such
7 as you or someone who is not a five or a six might be a nine or
8 a ten on that scale, is there anyway that anyone, by visually
9 inspecting a digital image, to know if that image contains
10 actual minors or not?

11 A. There is no way.

12 Q. Is there any type of software application, or filters, or
13 any other technical abilities or technical expertise that
14 exists in the industry which can be applied to these type of
15 images to give anybody any knowledge as to whether they are
16 viewing actual or virtual children?

17 A. There is no software or hardware available that can enable
18 a citizen to look at an image on their screen and determine
19 whether it contains an actual minor. It just doesn't exist.

20 Q. And is there any type of software which exists or method
21 by which any citizen by reading the name of a web site or
22 description of a web site, to enable that person to know if
23 they would be viewing images of actual or -- virtual or real
24 children?

25 A. No, the name of a web site or a file name, since they are

1 arbitrary and can be changed at the whim user of the file, or
2 the creator of the file, or someone who just is handling the
3 file, as well as the web site owner can make their web site
4 name whatever they like. As a result of that, those names
5 don't advance an individual's knowledge even one step as to
6 whether what they are looking at contains an actual minor or
7 not.

8 Q. Have you ever worked as an employee of a prosecution?

9 A. Yes, I have.

10 Q. When did you do that?

11 A. From 1996 to 2000, I was an assistant prosecuting attorney
12 for the Cuyahoga County Prosecutor's Office.

13 Q. And did you work on any famous cases in the State of Ohio?

14 A. I did. For the last year that I was there, I was part of
15 the team that defended the State of Ohio in the Dr. Sam
16 Shepherd civil lawsuit brought by his estate. Among other
17 things that I did for the case, I was tasked with preparing,
18 modifying, altering and getting ready for trial the entire
19 electronic evidence display that we used throughout the ten
20 trial.

21 MR. SMALLWOOD: Your Honor, if I have not offered any
22 exhibits heretofore, I would offer them at this point in time
23 and would pass the witness.

24 THE COURT: All right. Mr. Greer, your witness, sir.

25 MR. GREER: Thank you, Your Honor.

1 CROSS-EXAMINATION

2 BY MR. GREER:

3 Q. Now, sir, first as to authentication of an image or of a
4 digital image --

5 MR. SMALLWOOD: Your Honor, I'm going to object to
6 this. We're not here to determine authentication, we're here
7 solely on a Constitutional issue, whether or not this statute
8 is vague or overbroad. I think authentication is a jury issue
9 and it's irrelevant.

10 THE COURT: I thought you learned earlier not to
11 object until you heard the whole question. You never know.

12 MR. SMALLWOOD: I'm a slow learner.

13 THE COURT: There is nothing educational about the
14 second kick of a mule, right?

15 MR. SMALLWOOD: That's right.

16 THE COURT: All right. Why don't we hear what the
17 question is and then we'll see where we are.

18 Q. (By Mr. Greer) As to authentication, you don't contest
19 that an individual who would come into court, purportedly, and
20 have interviewed an actual minor from an image would be in a
21 better position to testify than you as whether or not that
22 image of that minor was an actual image versus a virtual image?

23 MR. SMALLWOOD: To which I'll object, Judge, that's
24 not the issues before the Court.

25 THE COURT: Overruled. He can answer the question.

1 A. I will do you one better, Mr. Greer. I think if you bring
2 that actual person who can testify they interviewed the minor
3 in the image, that's the best form of authentication that can
4 be made of that image and certainly better than an individual
5 who doesn't know the person depicted in the image, they can't
6 authentic it at all, obviously.

7 Q. (By Mr. Greer) Now you, being an expert in this field,
8 purportedly, you talk about Free Speech, a very important case
9 in this area, and you're aware of the two provisions in 2256
10 Title 18 that were struck down, correct?

11 A. I am, yes.

12 Q. And are you aware of subsection (c) that survived that?

13 A. I believe that's the section regarding morphing, morphing
14 of existing images of children, for example.

15 Q. Right.

16 A. Is that what your referring to? I'm trying to do it from
17 memory.

18 Q. Yes, morphing. What is morphing?

19 A. I don't know what the Supreme Court though morphing was.
20 I will speculate they mean taking a picture of an actual minor
21 and then somehow altering that actual minor to appear as if
22 they are involved in some sexual situation with another minor,
23 or an adult, or whatever.

24 Q. Like the face of an Olsen twin?

25 A. That would be correct, yes.

1 Q. Like you did?

2 A. How do you mean?

3 Q. Did you take the face of an Olsen twin and put it on an
4 adult body?

5 A. Let's be clear. I took digital images that I did not have
6 any participation in the creation of them. What purport to be
7 images of the Olsen twins are what I downloaded off the
8 internet. If they are really the Olsen twins or not, I can't
9 be the one to tell you, I didn't create those initial images.

10 That's just the starting image which to me appears to be the
11 Olsen twins, but I can't tell you that it is.

12 Q. And in your mind, the images of the apparent minors that
13 you used in your examples, you have no reason to believe that
14 they are not images of a real minors, correct, versus virtual
15 images?

16 A. I can't give you an opinion as to whether they are actual
17 minors or not. That was the whole point of my testimony with
18 Smallwood. I don't know. I can tell you they appear to be
19 minors, that's the best I can do. That's all I can say.

20 Q. You used what you believe to be, appeared to be minors and
21 put them in apparent sexually explicit conduct with adults;
22 correct?

23 A. I used images that appeared to be minors, yes, that's
24 correct. If you're qualifying it with what appears to be
25 minors, you're correct.

1 Q. And who you thought minors, correct?

2 A. I don't have any thought, I don't know, I can't advance my
3 knowledge. I can tell you they appear to be minors.

4 Q. And you created that on your computer?

5 A. I did.

6 Q. And you brought that computer across state lines to
7 Oklahoma, correct?

8 A. I did.

9 Q. Now, sir, as to the factors and I believe -- forgive me if
10 I'm mispronounce, but the Martian case or Marchand case that
11 you testified to earlier?

12 A. Yes.

13 Q. You are familiar with that, correct?

14 A. Yes, I am.

15 Q. And the different factors that the Court used in that
16 case, you recited those factors, correct?

17 A. I went over a summary of them. I don't know if I recited
18 them all, but...

19 Q. And can you tell me again what your opinion is as to those
20 factors and their relevance or nonrelevance to whether or not
21 someone would know they were viewing an image of an actual
22 versus a virtual child?

23 A. The relevance is this: The court in Marchand was
24 examining elements of digital images and making a determination
25 that because they saw what they thought were realistic light

1 sources, realistic shadows, utterly real expressions on the
2 minors' face, I think was the quote they made, that convinced
3 them that what they were looking at were actual minors. And my
4 demonstration with the exhibit I used was, that is not
5 technologically an appropriate way to analyze whether a digital
6 image contains an actual minor because I obviously created one
7 that had all those Marchand factors, but wasn't an actual
8 minor. And they could have easily been doing that in that
9 case, looking at an image similar to the one I produced and yet
10 convicting that defendant.

11 Q. And since we can never actually get into the mind of a
12 defendant at any given moment to know what he or she is
13 thinking, let's say at the time that they are downloading these
14 apparent images, would it's be reasonable to look at
15 circumstantial evidence surrounding that downloading to
16 determine, to help determine what may have been in that
17 defendant's mind when they were downloading that image?

18 A. I would say that it would be reasonable to look at any
19 information which advances that defendant's knowledge about
20 whether the image contains an actual minor. Any information
21 like that would be reasonable to look at, yes.

22 Q. And you are familiar with 404(b) evidence, aren't you?

23 A. Yes.

24 Q. You used it as a prosecutor, didn't you?

25 A. I think there were a couple of times, yes, where we --

1 well, I don't remember if we were successful, but we no doubt
2 argued to a judge for the ability to use that type of evidence,
3 yes.

4 Q. I think this is one of the cases that was not reversed.

5 Let me refer to it. State v. Jackson, do you recall that case?

6 A defendant found guilty of aggravated murder and attempted
7 murder. You were the assistant prosecutor, Michael Horne was
8 the assistant prosecutor and Richard Bell?

9 A. Yes, I do. We tried that case twice. We had a mistrial
10 the first time and the second time finally a conviction.

11 Q. Correct.

12 A. I don't remember which prosecutor I was with. I was
13 second chair on that trial both times.

14 Q. Have you ever tried a case by yourself as a state
15 prosecutor?

16 A. Yes, not murder cases, but other cases --

17 Q. How many times?

18 A. That was a murder case, the major trial division handles
19 those. I was not ever in that division, so I was second chair
20 on those, both those murder cases.

21 Q. And you recall in that case using 404(b) evidence to show
22 that a defendant's prior access to firearms was relevant to
23 show his opportunity in relation to the murder?

24 A. I'll have to rely on whatever it is you're reading there.

25 I have no recollection, specifically, of 404(b) in that case.

1 All I can remember is there was a defendant, there was a murder
2 and I tried it twice. It was quite a few years ago.

3 Q. Yes, sir. Do you remember using a confession in that
4 case?

5 A. I vaguely -- I vaguely recall that the defendant made a
6 confession to someone else, not to police officers, but to a
7 girlfriend or something like that, that we were attempting to
8 use, and maybe we were successful in using it, I don't recall.

9 Q. Thank you. So certainly you understand the importance of
10 a defendant's own words, that would be pretty potent evidence
11 of what may have been in his or her mind at a given time,
12 correct?

13 A. Well, in that case it was evidence of what he did, so
14 that's how we were using it. It certainly is evidence of what
15 he did if he told someone that he committed a murder.

16 Q. If someone -- all right, if someone told you I downloaded
17 child pornography, what would that mean to you?

18 A. That would mean to me that the person downloaded an image
19 that to them appeared to be child pornography, because there's
20 no way they could know. They certainly aren't saying that they
21 know they downloaded child porn, because as I told you, it's
22 impossible for them to know that unless they participated in
23 the creation of that image.

24 Q. So from all that, is your answer that you think that
25 they -- you would mean that they believe that they downloaded

1 child pornography, whether or not it was or not?

2 A. No, my answer would be they downloaded something they --

3 that appears to be child porn. They could have easily been --

4 There's two things they could have done. They could have been

5 exercising a First Amendment right according to our Supreme

6 Court or they could have been committing a felony. Which one

7 they did, they don't know and I can't tell you.

8 Q. Have you ever come across a case where in your vast

9 experience where an individual has confessed to downloading

10 virtual child pornography?

11 A. No, I don't know how they would do that. How would they

12 know what they were downloading until they were later told by

13 law enforcement what it was. So, I've never heard of such a

14 case.

15 Q. And have you heard of a case where a defendant has

16 admitted to downloading child pornography?

17 A. Have I, just like in the media, heard of a case? Is that

18 what you're referring to?

19 Q. No, in your experience at all.

20 A. I believe in the Marchand case, as a matter of fact, there

21 was some confessional statements made by that defendant

22 indicating that he had downloaded child porn and he knew that

23 they were actual minors or something like that. I'm trying to

24 recollect the whole case.

25 Q. I understand. And although not the entirety of the

1 evidence of what may have been in that defendant's mind,
2 certainly it would be a factor to consider in determining what
3 the defendant may have been thinking he was downloading at the
4 time?

5 A. As to what he's thinking?

6 Q. Or as to what he thought he was downloading at the time.

7 A. Yes, if he's saying I think I have child porn, then that's
8 what he thinks.

9 Q. Are you aware Mr. Shreck made that statement?

10 A. I am not.

11 Q. So is that now a factor in your consideration in this
12 case?

13 A. Not at all.

14 MR. SMALLWOOD: Judge, I object to that. He's
15 indicated that he was not aware of that. How can it be a fact.

16 THE COURT: Sustained.

17 Q. (By Mr. Greer) Sir, do you recall writing an article, The
18 Cutting Edge, I believe?

19 A. That's actually a column that I write on law and
20 technology for about the past eight years or so for the
21 Cleveland Bar.

22 Q. I apologize.

23 A. But not --

24 Q. Do you recall writing that body of work?

25 A. Yes, I try to crank one out once a month. It's often a

1 challenge to find new topics after that period of time.

2 Q. Now in regards to that article, The Cutting Edge, you had
3 indicated the difficulty of post Free Speech, did you not, in
4 determining whether or not an image was actual or virtual?

5 A. Well, I don't know which article -- I've written on it a
6 couple of times. I wouldn't say that's an accurate statement
7 of my opinion. It's always been impossible to determine if
8 what you're looking at on the internet, whether it's a digital
9 I image from MSNBC which claims to be from the Iraq War,
10 there's no way any of us looking on their web site can say to
11 reasonable degree of scientific certainty or otherwise, that
12 that's an actual image, unaltered, from the Iraq War. So, the
13 U.S. Supreme Court didn't create a new thing in digital
14 imaging, they just captured what they -- what their opinion
15 was, protected images which are those that appear to be real,
16 but aren't, and the proscribed ones which have always been
17 proscribed, so...

18 Q. You take us through a hypothetical in that article, if you
19 recall, about a detective being questioned on the witness
20 stand.

21 A. Yes, I recall, generally, that article, writing that.

22 Q. Okay. And you had indicated it's a discourse between the
23 attorney, purportedly the prosecutor or maybe the defense
24 attorney and the detective and it goes, "Do you know the
25 identity of the child in this image?" The detective says no.

1 And you say "Statistically in the overwhelming majority of
2 child porn cases, no local victims exist."

3 If there was evidence that, as I said earlier, those
4 victims were identified as actual minors, then that would
5 answer that potential problem in that hypothetical, correct?

6 A. I don't understand what the -- what is the potential
7 problem you're pointing out? I'm not understanding you.

8 Q. That was a terrible question. I apologize.

9 In the hypothetical, the detective indicates he does
10 not know the identity of a child in the image. What was the
11 purpose of you writing that question and that answer.

12 A. That question and that answer relates to authentication,
13 not the issue of whether a defendant can tell whether a minor
14 is in an image, that's after a Court has determined, yes,
15 there's a way a defendant could have known this, so therefore
16 let's go to trial. Now the detective's on the stand in that
17 hypothetical and is being asked to authentic a digital image
18 and declare from the witness stand that it in fact includes an
19 actual minor. And the point of that hypothetical is because
20 there are, in the overwhelming majority of cases, no local
21 victims, that law enforcement professional is going to be left
22 guessing that it's a minor or being allowed to offer hearsay
23 about what some other law enforcement professional told him or
24 her, that it's a minor, or some such other type of testimony
25 that I regarded in the hypothetical as questionable under the

1 Rules of Evidence.

2 Q. Have, in your experience, have you ever created an image
3 of a virtual child?

4 A. Using the definition that was in the Ashcroft case, every
5 one of the images you just saw were virtual child pornography.
6 That's the definition I'm going by is the Supreme Court, unless
7 there's another one you want me to use.

8 Q. Yeah, I want you to use the definition -- well, let me ask
9 it a different way.

10 When you take the child -- when you take the face, the
11 head of an actual minor, or the body and face of an actual
12 minor and insert it into another digital image where it makes
13 it appear as if that minor is performing sexually explicit
14 conduct, do you agree or disagree that that's still a violation
15 of the law today?

16 A. My reading of that Section (c) you referred to is if a
17 person has an image in front of them that they know is an
18 actual minor and then, depending on what the court meant by
19 morph, morphs that into a sexual situation, my opinion was,
20 would be that that Section (c) would come into play, because
21 the individual knows that's an actual minor.

22 Q. And if one can never get into the mind of an individual, a
23 defendant or suspect at that time, what factors do you see as
24 relevant in determining what -- whether a defendant believed
25 that he was a downloading an actual image versus a virtual

1 image?

2 A. The way this statute could be applied to a defendant is
3 this way. An individual who's in the image, him or her
4 herself, with the minor, they clearly know that that's an image
5 of child pornography, they're in the image.

6 Secondly, if there was circumstantial evidence of
7 witnesses or others that this person captured the image with
8 either their film camera or their digital camera. Clearly you
9 now have circumstantial evidence that they know that the image
10 they possess is a minor because they captured it.

11 So those are two circumstances I can think of where
12 knowledge could be established. It simply can't be established
13 by a person downloading images off the internet that come from
14 who knows where. They can't ever know.

15 Q. However, could a factor that law enforcement looks to be
16 the number and nature of web sites that this individual had
17 visited during the period of time that these images were
18 downloaded? Could that be a factor in determining what a
19 defendant -- whether a defendant knowingly downloaded child
20 pornography?

21 A. It can't. Technologically it doesn't advance that
22 defendant's knowledge one step, because as I mentioned to you,
23 before I told you or testified earlier, if I'd have said to
24 you, Mr. Greer, let's go to your home computer and I want you
25 to go to child port dot com, you might be concerned about, hey,

1 Mr. Boland, I don't think I'm going to do that, I'm an
2 Assistant U.S. Attorney and I don't want whatever comes up on
3 that home page to hit my computer. You obviously would assume
4 that that site contains illegal material when it doesn't.
5 Likewise, if you went to a web site that virtual child porn dot
6 com, you might still be worried, I think reasonably so, that
7 just because the website's named virtual child porn dot com,
8 you as an Assistant U.S. Attorney, don't want to take the
9 chance that an actual minor involved in a sexual situation gets
10 downloaded to your computer. That's my point. You cannot
11 trust web sites. So if an individual went to ten different
12 sites that all imply that these are actual minors on those web
13 sites, it doesn't change the -- it doesn't advance their
14 knowledge one bit about whether what they downloaded was an
15 actual minor.

16 Q. Do you think it's reasonable to assume that someone who
17 went to ten web sites, none of which the name "virtual" was in,
18 and all of which contained the name "child pornography" or
19 "kiddie porn", do you think it's reasonable to assume that that
20 person was looking for child pornography?

21 A. I have no way to really answer that question as to whether
22 it's reasonable to assume that they are looking for the real
23 child pornography, because the reality is they could know that
24 individuals who create virtual child pornography are never
25 going to market it as virtual child pornography. They want to

1 market it fraudulently, of course, as the real thing. So this
2 individual might well know I've got to go to sites that imply
3 it's the real thing to find the virtual stuff because no one's
4 going to advertise it -- no one's going to advertise I have
5 virtual child porn because they are recognizing, as I think is
6 a reasonable assumption, that the majority of people searching
7 for child porn on the internet would prefer the real thing.
8 These individuals want reality, they don't want the fake stuff.
9 So anyone who creates virtual child porn is not going to market
10 it that way. So knowing that, going to sites that imply it's
11 actual minors that -- who knows what that person was thinking.
12 They're trying to get virtual stuff on that site, who knows
13 what they are thinking. I can't say.

14 Q. Is that a no?

15 A. It's the answer in the transcript. I can't say.

16 Q. What if you had that evidence coupled with the defendant's
17 admission that he downloaded child pornography, would those two
18 factors come into play together?

19 MR. SMALLWOOD: Judge, I'm going to object to that, as
20 it assumes a state of facts not evidence.

21 THE COURT: Mr. Greer, where-- I mean, we're going to
22 have an argument section of this and not to derogate the
23 witnesses skills as a lawyer, but that's kind of my department.

24 What we're doing here is to talk about the facts and
25 then what can be adduced about the capability of the

1 technology. This witness is here with some specific orders
2 from the Court as set out in our April 12th, 2004, order, and
3 one of the direct orders to this witness was to be prepared to
4 address all of the issues in United States vs. Marchand. And
5 clearly the preparation of these exhibits was done in response
6 to that court order that he be prepared to address it, but
7 that's a factual inquiry and not a legal inquiry. You can pick
8 his brain in the hall, if you want. But for our purposes,
9 let's keep it to the facts.

10 MR. GREER: I will, Your Honor.

11 THE COURT: All right.

12 Q. (By Mr. Greer) Sir, the Defendant's Exhibit 33 that has
13 the variety of different images that you testified to?

14 A. Oh, yes, the contact sheet I see what you're saying.

15 Okay.

16 Q. Do you recall the questions about that and testifying to
17 that?

18 A. Yes.

19 Q. Are any of those images, were any of those images created
20 by you from blank space, nothing?

21 A. No.

22 Q. Have you ever created an image, a virtual image of a child
23 from nothing?

24 A. No.

25 Q. Ever?

1 A. No.

2 Q. Have you -- I'm sorry.

3 A. No, I have not.

4 Q. Have you ever heard of any other experts in your field

5 creating a virtual child from nothing?

6 A. No.

7 Q. And why is that?

8 A. I agree with Detective Holloway, the technology is not

9 advanced enough, for purposes of a demonstration here or the

10 educational things I do with the software and using these

11 images, the technology is not to the point where you can take a

12 blank screen and paint with any kind of a program, and make an

13 image of a child that would fool even the most casual observer.

14 It just -- that technology is not here. That's the technology,

15 as you had asked me before, which was exclusively dealt with in

16 Marchand, but the technology for Photoshop to do what I've

17 demonstrated has been around for eight or ten years now.

18 Q. And your technology requires the existence of some sort of

19 image first, correct?

20 A. Yes, to do what I've done, I had starting images in all

21 the examples, that's correct.

22 Q. It does not have to do with creating a virtual image from

23 nothing, correct?

24 A. Well, you're mixing your words here. Creating an image

25 from nothing. Yeah, creating a digital image from nothing, a

1 blank screen, that's not what I'm doing, correct.

2 Q. You're starting with some sort of image and making some
3 modifications to it in some form or fashion?

4 A. Yes.

5 MR. GREER: One moment, Your Honor.

6 THE COURT: All right, go ahead.

7 MR. GREER: I will pass the witness, Your Honor.

8 THE COURT: All right. Mr. Smallwood.

9 MR. GREER: Very briefly.

10 REDIRECT EXAMINATION

11 BY MR. SMALLWOOD:

12 Q. Given your testimony here and the exhibits that have been
13 offered and introduced in this hearing, assuming that I wanted
14 with all my heart and soul to see images on a computer screen
15 that showed actual children engaging in explicit sexual conduct
16 in violation of this statute, assuming I wanted to do that more
17 than anything in the world, I accessed a web site or something
18 on the internet that purported to show me those images that I
19 wanted, what could convince me or what could I do to make
20 certain to myself that I was in fact looking at actual minor
21 children engaged in explicit sexual conduct?

22 A. There's nothing you can do.

23 Q. Absent being the person who captured the image or
24 participated in the image, there is no ability that anyone has
25 to be able to make that determination?

1 A. There's no ability to have to know. They can guess, flip
2 had a coin, speculate all they want, but to know what they are
3 looking at is an actual minor, again, I refer to this Exhibit
4 35. I was fooled by that cover and someone could easily --
5 perhaps Demi Moore's face isn't even the face that belongs on
6 the that body, I can't tell you. I'm looking at it just like
7 you are and all evidence of any alteration is erased from that
8 image. It's same for any user on the internet. I can believe
9 this is Demi Moore on the front of this Exhibit, but I don't
10 know and I'll never know.

11 Q. That doesn't make it so?

12 A. It doesn't make it so, no. And you could tell me it is
13 her, you could even tell me you captured the image. I'm still
14 relying on you or relying on the Star magazine, but I don't
15 know.

16 Q. Regarding the images that you have created and the
17 exhibits that we have offered in this courtroom, partially at
18 any rate, at the Court's direction, do you have any information
19 that would lead you to believe that any of the images that you
20 used to create this were actual children or virtual children?

21 Do you have any way to know that won't way or the other?

22 A. No, I don't and in fact these were created to demonstrate
23 the technology and to be in conformance with the Court's order
24 to -- and also for some educational purposes, a selection of
25 these images is used at my CLE programs to caution both judges

1 and lawyers about the use of digital images and some of the
2 concerns therein. So these have multiple purposes, not only
3 educational but they're technological demonstrations as well as
4 now trying to conform as best I could, to Judge Holmes' order.

5 Q. Your -- the definition that you have been using in this
6 hearing of the virtual child pornography, we have on an easel,
7 is that -- did you create that?

8 A. Did I create the definition?

9 Q. No, no, the exhibit or the document.

10 A. Yes, I excerpted that directly from Ashcroft vs. Free
11 Speech Coalition, that definition is contained in the first
12 paragraph of the syllabus of that opinion.

13 Q. And is that the definition you have been using in
14 testifying here today?

15 A. Yes, and in my previous cases, I assume the Supreme Court
16 definition is the one that controls so that's what I go by.

17 MR. SMALLWOOD: Pass the witness.

18 THE COURT: Anything further, Mr. Greer?

19 MR. GREER: Yes, Your Honor.

20 THE COURT: Go ahead.

21 MR. GREER: Thank you.

22 RECROSS-EXAMINATION

23 BY MR. GREER:

24 Q. Sir, counsel asked you about the defend -- or about an
25 individual, the impossibility of them actually knowing that an

1 image they downloaded was actual, was an actual child or a
2 virtual child, correct?

3 A. Yes, I recall that question.

4 Q. And you agree -- or your response was it would be
5 impossible for a layperson to determine that?

6 A. Let me qualify that. It would be impossible for a person
7 who did not participate in the creation of the image to know
8 it's an actual minor. So layperson, expert, whoever, that's
9 the qualification I'd make.

10 Q. However, would it be possible for someone who downloaded
11 an image of a minor to have reason to know or an awareness or
12 notice or a belief or a grounds for belief warranting further
13 inspection that the image may be real versus virtual?

14 A. That sounds like had a quote that came out of Marchand
15 regarding willful blindness, I believe that's what you're
16 referring to. And they may have reason to know -- not reason
17 to know, scratch that. They might have reason to believe
18 because web site claims that these images are real, but the
19 flaw in that logic is the final part of your comment which is
20 "warranting further investigation." As I've testified and
21 Detective Holloway conceded, even further investigation of
22 these images, knowing the file name, and in fact the Government
23 claiming to know who submitted this image to a data base, that
24 further investigation, the Government still cannot determine
25 and know that that's an actual minor. Certainly a citizen

1 can't either. So the flaw in there is there's no further

2 investigation they can do, sir.

3 Q. And if, in sticking with my question regards to a -- this

4 is a former jury instruction that this Court here has given

5 before in a case similar to this, you indicated that when I

6 asked about any grounds for belief warranting further

7 inspection or inquiry, I'm referring to a suspect when they

8 download an image, if they do no further inspection or inquiry

9 in relation to that image, but merely download other images

10 from other web sites of apparent child pornography and do not

11 further investigate those images, would that be relevant to you

12 in determining whether or not that person thought or believed

13 that they were downloading actual versus virtual child

14 pornography?

15 MR. SMALLWOOD: To which I'll object, Judge. The

16 thought or belief is not the issue. It's knowledge.

17 THE COURT: He can ask the question. Go ahead.

18 A. It would not be relevant because there is no further

19 investigation that an individual can do besides looking at the

20 image, which Detective Holloway and I agree, is not sufficient

21 to determine it's an actual minor; looking at the file name of

22 the image, which the Government and I agree, is still not

23 sufficient to determine it's an actual minor; or looking at the

24 name of the web site from which they downloaded the image,

25 which as I testified is infinitely malleable and also does not

1 guarantee knowledge that it's an actual minor.

2 So there -- the question is sort of two questions in
3 one. There's no further investigation they can do, so it
4 really doesn't qualify as willful blindness. It's not like
5 it's a box marked cocaine and they refuse to open it. There's
6 nothing for them to open any further. They have what they have
7 and that is insufficient information to give them knowledge, no
8 matter what.

9 Q. (By Mr. Greer) If they have what they have and they've
10 done that for over a year on hundreds of web sites that appear
11 to depict child pornography, is that probative to you to what
12 they thought that they were downloading?

13 A. It isn't because it's still, without knowledge, appears to
14 be they are exercising their First Amendment right. Once they
15 know that they have an image of an actual minor, they have
16 crossed the line.

17 Q. Using your common sense, would that come into play as to
18 whether that person knew, based on the scenario I just gave
19 you?

20 A. Actually, using my common sense it would indicate they
21 don't know, there is no way for them to know. It's still the
22 same answer.

23 MR. GREER: Thank you.

24 THE COURT: All right, anything further?

25 MR. SMALLWOOD: No, Your Honor.

1 THE COURT: All right. You stay step down. Thank you
2 sir.

3 THE WITNESS: Thank you, Your Honor.

4 THE COURT: All right, Mr. Smallwood, anything
5 further, sir?

6 MR. SMALLWOOD: We have nothing further, Your Honor.

7 THE COURT: All right, Mr. Greer, anything further,
8 sir, on this?

9 MR. GREER: No, Your Honor, thank you.

10 THE COURT: All right. At this time I would like to
11 recall Mr. Holloway. If you could return to the stand, please
12 sir, I remind you you are still under oath.

13 THE WITNESS: Yes, sir.

14 DONALD HOLLOWAY

15 Called as a witness called by the Court, having been previously

16 sworn, testified as follows:

17 EXAMINATION

18 BY THE COURT:

19 THE COURT: Mr. Holloway, tell me about, and I
20 understand Mr. Greer's focus on those things that deal with
21 morphing and taking a head and moving it on to a body, but
22 let's start with this Defendant's Exhibit 29, for example,
23 which is, I would say topless, but it doesn't really narrow it
24 down a whole lot.

25 MR. SMALLWOOD: Your Honor, he may not have --

1 THE WITNESS: I don't have that up here.

2 THE COURT: All right, if you could bring that
3 forward, please.

4 There's certainly a distinction between what passes as
5 a so-called morphing and what we've seen here today, that is
6 alterations of a body to make an adult into a minor. Have you
7 previously seen this kind of a presentation that we've seen
8 today?

9 THE WITNESS: I've seen demonstrations on how you can
10 cut and paste a picture on to another, which is what I term a
11 morphing.

12 THE COURT: Right, that's the morphing part.

13 THE WITNESS: Yes.

14 THE COURT: But I'm talking about taking an adult,
15 that's not morphing, what we saw here, at least with respect to
16 this Exhibit 29 and several other of the exhibits, is actually
17 taking somebody who started as an adult and with respect to
18 shadows, effecting size reductions and color reductions, that
19 had the effect of changing an adult into a child.

20 THE WITNESS: Right.

21 THE COURT: Is that a demonstration you have seen
22 before today?

23 THE WITNESS: I've seen similar things, yes.

24 THE COURT: Okay. Having seen this part of the
25 presentation, and I mean you do this and it's important work,

1 how is somebody supposed to know if you're looking at Exhibit
2 29 as the child presentation, that is as it currently exists,
3 how would one know or could one know, in that circumstance,
4 that it was a child or was an adult or was...

5 THE WITNESS: To me it would have to go --

6 THE COURT: Is it something that's knowable?

7 THE WITNESS: I'm sorry.

8 THE COURT: Go ahead.

9 THE WITNESS: Yes, I think it's knowable, based on
10 what the person that's looking at the image at the time thinks.
11 If they think it's a child and it looks like a child, to me
12 their knowledge is yes, that is a child.

13 THE COURT: But we know that Exhibit 29 is not a
14 child, right? I mean --

15 THE WITNESS: -- as far as we can tell, yes.

16 THE COURT: Based on the testimony here today, right?

17 THE WITNESS: Yes, sir.

18 THE COURT: We know that at least the starting image
19 that was modified was not a child, right?

20 THE WITNESS: Yes.

21 THE COURT: Does it become unlawful once it's modified
22 to look like a child, even though we know it's not a child?

23 THE WITNESS: In my opinion, yes. Once the picture
24 looks like a child, it's a violation of the child pornography
25 statutes. And like I said, you have to take in the whole

1 totality of everything that's going on, just one image like
2 that in and of itself may not be a violation, but when you look
3 at the whole number of pictures, any other type of --

4 THE COURT: No, understand that. I'm just trying to
5 focus on this one issue, because the question -- what we're
6 doing here today is about enforceability of the law itself,
7 not -- we're not trying to retry the case or try the case in
8 advance and we sort of spilled over into that at various times.
9 But I'm not -- that's not my purpose here. My purpose here is
10 to try to appreciate the legal requirements the statute
11 contemplates and then to figure out whether as a fact matter,
12 that the facts, there are circumstances under which it's simply
13 not knowable.

14 Now, you would agree that if you have a picture that
15 looks like Exhibit 29 and the possessor of that knows the child
16 involved, therefore they know that's a child, right?

17 THE WITNESS: Yes, sir.

18 THE COURT: Okay. And that and that satisfies the
19 knowing element and that's a big part. Now, suppose that this
20 person holds the same picture and knows that it's not a child
21 because they know it started as an adult and was massaged,
22 right?

23 THE WITNESS: Yes.

24 THE COURT: Now that's clearly they can't know it was
25 a minor because they know it wasn't a minor, right?

1 THE WITNESS: Yes, following that logic, yes.

2 THE COURT: They can't both know it's a minor and know
3 it's not a minor at the same time, right?

4 THE WITNESS: Yes.

5 THE COURT: So in that case, they can't be prosecuted
6 for knowing that they had pornography of a child, because in
7 fact they knew and they knew it was not a child?

8 THE WITNESS: Yes, the person that did that to the
9 picture, I would agree with that, yes.

10 THE COURT: Right, because they -- right. So then the
11 question is, if you just have this picture, this is the only
12 thing that you've got in your collection and how do you know,
13 given what we've seen, whether this was started as an adult or
14 was a minor. Is that a knowable thing, from your standpoint?

15 THE WITNESS: Not under those circumstances, no, sir.

16 THE COURT: All right. And so how would we prove or
17 could we prove, with respect to that defendant? It would then
18 be impossible, at least what I understand your testimony, it
19 would be impossible to prove beyond a reasonable doubt that
20 they knew they were possessing a picture of a minor, right?

21 THE WITNESS: Once again I think you would have to go
22 back to the entire circumstances around that, just the picture
23 in and of itself may not be, but if you look at what the person
24 that downloaded it or kept the picture, what they thought it
25 was, then I believe at that point you can have a violation. If

1 they actually thought it was a 12-year-old girl that was nude,
2 and the picture depicts what appears to be 12-year-old that's
3 nude, I believe at that point you have a violation.

4 THE COURT: But we know that if the person who can
5 possess this picture, if you made the changes, right?

6 THE WITNESS: Yes.

7 THE COURT: And you agree that that person is not
8 subject to the statute because they knew it was an adult,
9 right?

10 THE WITNESS: Yes.

11 THE COURT: Okay. But if that person gives it to
12 somebody else who we agree doesn't know it, right?

13 THE WITNESS: Right.

14 THE COURT: Because they weren't there.

15 THE WITNESS: Right.

16 THE COURT: But they believe or would like to believe
17 that it is a minor, they are now guilty?

18 THE WITNESS: I believe so, yes, sir.

19 THE COURT: Because even though they can't know it and
20 don't know it, they believe it?

21 THE WITNESS: Yes, sir.

22 THE COURT: Or they would like to believe it, or
23 that's certainly what they went looking for?

24 THE WITNESS: Yes.

25 THE COURT: And so the statute, your view, on a

1 picture that a person who created it can't be prosecuted,
2 actually the next person in line can be because they don't
3 know?

4 THE WITNESS: Yes, sir. And to me a reasonable person
5 at that point if they receive information like that, they could
6 report it to the police and say I got this picture, it appears
7 to be a child and they could turn it over to the police which
8 is what I think any reasonable person would do instead of
9 keeping that picture and putting it with others or even keeping
10 that one picture, having the belief that that is an actual
11 child.

12 THE COURT: Now part of the position of the United
13 States necessarily in prosecuting this case as previewed by
14 some of the examination that's gone on before, is to establish
15 that in fact minors were involved in it, right?

16 THE WITNESS: Yes, sir.

17 THE COURT: But if the person, if the picture,
18 hypothetically, if Exhibit 29 was of a minor, right?

19 THE WITNESS: Yes.

20 THE COURT: But the person who got it believed,
21 because they had seen this demonstration, believed that it was
22 a modified picture of an adult, is that person now innocent?

23 THE WITNESS: I don't know, sir.

24 THE COURT: Well, but I'm just saying before if they
25 believed it was a minor when it was really an adult, they were

1 going to go down for it, right?

2 THE WITNESS: Yes.

3 THE COURT: And now if they believe it was an adult
4 when it was a minor?

5 THE WITNESS: Then I think you have to go with the
6 reasonableness of what the person is thinking as they are
7 looking at the picture, what do they will really think. And if
8 they think it's a person that's an adult that's 23 years of
9 age, but in actuality it's an eight-year-old, I mean, you can
10 obviously tell the difference between a 23-year-old and an
11 8-year-old. If you are dealing with a 23-year-old and a
12 17-year-old, then I guess a reasonable person could probably
13 confuse those, so you would have to look whole picture itself.

14 THE COURT: And you would agree, at least with respect
15 to Defendant's Exhibit No. 29, that no reasonable person could
16 know that that was an adult or a minor, right, from what we
17 have seen?

18 THE WITNESS: Yes, sir, that's what I would say. As
19 far as that specific picture like that, yeah.

20 THE COURT: And that knowledge certainly couldn't be
21 proven beyond a reasonable doubt, it couldn't be proven by any
22 burden of proof, right?

23 THE WITNESS: No, sir, from that picture, looking on
24 this spreadsheet, I could not tell you how old that person was.
25 It could very well be an adult as far as I'm looking at it and

1 if it was a child, you know, it would be an older teen.

2 THE COURT: But nevertheless a violation of the
3 statute?

4 THE WITNESS: Yes.

5 THE COURT: If in fact a minor, right?

6 THE WITNESS: Right.

7 THE COURT: All right, anything further from this
8 witness based on my questions?

9 Mr. Smallwood, anything further of Mr. Holloway?

10 MR. SMALLWOOD: I have one, if I could, Judge.

11 THE COURT: Yes, go right ahead.

12 CROSS-EXAMINATION

13 BY MR. SMALLWOOD:

14 Q. Detective Holloway, based upon your responses to Judge
15 Holmes' questions, am I correct in that if one of your golfing
16 buddies asked you for some advice as to whether something pops
17 up on his screen that appears to be similar to Defendant's
18 Exhibit No. 29 and he knows, talked with you about what you do
19 for a living and, he knows a little bit about that, a little
20 bit about your expertise, am I correct in assuming that you
21 would tell him the safest thing for you to do is just throw
22 that stuff away and never look at it, don't get anywhere near
23 it?

24 A. That would -- just for the one time, yes, that's what I'd
25 tell him to do.

1 Q. Well, what about -- you say just for the one time. What
2 about in the future?

3 A. If it became a recurring thing and he kept talking about
4 that, I'd start wondering what he was doing.

5 Q. Well, but your advice to a person who views any images
6 similar to Defendant's Exhibit No. 29 is to exercise your
7 discretion on the side of caution and don't exercise your First
8 Amendment rights to look at that stuff, because you might very
9 well, inadvertently, be violating the statute, if that was an
10 actual child?

11 A. That is correct.

12 Q. Okay.

13 MR. SMALLWOOD: Pass the witness, Your Honor.

14 THE COURT: Mr. Greer, any questions, sir?

15 MR. GREER: Yes, Your Honor.

16 THE COURT: Go ahead.

17 CROSS-EXAMINATION

18 BY MR. GREER:

19 Q. And Detective Holloway, in regards to Defendant's Exhibit
20 No. 29, if that exhibit, you had found on a computer, on a hard
21 drive of a computer and had found several other photographs of
22 the -- or several other images of the same apparent minor in
23 the same scenario, would that have any bearing on your opinion
24 as to whether or not that image was an actual minor or not?

25 A. Yes, it would.

1 Q. Why?

2 A. A series would be a collection of several different photos
3 of that same person in probably the same setting, that would be
4 something that would be harder to recreate due to the
5 backgrounds and the scenery and the actual person itself, it
6 would be difficult to get the same thing over and over like
7 that. And that's why we look at backgrounds and see if the
8 background changes any, if they're in different types of
9 settings, you look at all of that. The series would, to me,
10 would be harder to than an individual picture.

11 Q. What about an MPEG movie of an apparent minor engaging in
12 sexually explicit conduct? What if that were also on a
13 suspect's computer?

14 A. Of the same person?

15 Q. Yes.

16 A. Yes, that would be extremely, if not, I would say
17 impossible to recreate that.

18 Q. Did you find any MPEGs in this case.

19 A. Yes.

20 Q. Do you recall what that was entitled?

21 A. Something along the lines of "dad do six" or something
22 like, along those lines. I can't remember the exact title of
23 it.

24 Q. Did you watch it?

25 A. Yes.

1 Q. Can you tell us what it appeared to depict?

2 A. An adult male having sexual intercourse with a young
3 female.

4 Q. Thank you.

5 THE COURT: All right, anything further?

6 MR. SMALLWOOD: Just a couple.

7 THE COURT: Go ahead.

8 RECROSS-EXAMINATION

9 BY MR. SMALLWOOD:

10 Q. Detective Holloway, in reference to Defendant's Exhibit
11 No. 33, as well as all of the exhibits which I believe you
12 viewed, 1 through 32, can you tell this Court which of those
13 images depict the use of actual children and which don't?

14 A. No. 1 appears to.

15 Q. No, no, no, no. Not what it appears to. Which of those
16 images, you can say with certainty depict are using actual
17 children, not what appears, it clearly appears that way, but
18 how do you discern that they are actually using actual
19 children?

20 A. Based on Mr. Boland's statements that defense Exhibit No.
21 1 contains pictures of one of the Olsen twins which are known
22 to be under the age of 18, I would say that one would be.

23 Q. Do you know when that picture was taken?

24 A. I have no idea.

25 Q. Do you know how old the Olsen twins are?

1 A. I believe they are 17.

2 Q. How do you know that?

3 A. There's a radio station that I listen to sometimes that
4 has a countdown clock 'til they turn 18.

5 Q. What's their date of birth?

6 A. I couldn't tell you that.

7 Q. Do you know if Mr. Boland knows when these photographs
8 were taken?

9 A. No.

10 Q. Or these images were created?

11 A. No.

12 Q. Then he doesn't know how old they are?

13 A. Yes, he does.

14 Q. How does he know that?

15 A. He said in his testimony that they were under the age of
16 18.

17 Q. How would you know that any of these images were created
18 using actual children?

19 A. They all were. I mean, not all. I mean, No. 22 was, No.
20 1, No. 13 --

21 THE COURT: Mr. Holloway, let me ask you, let me just
22 try to... If I understand what Mr. Smallwood is asking you is
23 if you were merely handed this contact sheet without reference
24 to any of the testimony, I believe is the question.

25 MR. SMALLWOOD: A better question, by viewing this

1 contact sheet.

2 THE COURT: Just by viewing the images themselves as
3 you've seen them on the contact sheet and on the screen,
4 whether in viewing them, any of these you would say that you
5 know, whether or not these involved actual children?

6 THE WITNESS: As far as I'm aware, you cannot create
7 an image of a child virtually. Therefore, the images to me
8 that appear to be kids, such as in Defense Exhibit No. 22, it
9 appears to be an actual child, as does Defense Exhibit No. 13,
10 appear to be actual children and I believe they are actual
11 children.

12 Q. (By Mr. Smallwood) Engaged in explicit sexual conduct?

13 A. Yes.

14 Q. But you saw how that was created?

15 A. With using pictures of what are real kids.

16 Q. But they weren't engaged -- there was no sexual
17 exploitation going on there, was there?

18 A. But once that's construed to look like that, then you have
19 a violation.

20 Q. That's your reading of the statute?

21 A. That is the morphing, the way the morphing exception reads
22 and the definition that you have on the board of virtual child
23 pornography says by any means other than using real children.
24 There were real children used in this, therefore, to me, that
25 does not apply.

1 Q. How do you know that's a real child?

2 A. They can't be created like this.

3 Q. Well, how do you know that's not a composite of hair and
4 eyes and nose and chin from four different children?

5 A. The picture --

6 Q. Pardon me, sir. How do you know that by viewing this
7 document?

8 A. They do not appear to be morphed in any way other than --
9 or they appear to be morphed.

10 Q. I'm not talking about what it appears to be. How do you
11 know, what gives you knowledge that the image in Defendant's
12 Exhibit No. 22 is an actual child?

13 A. I can't say with a 100 percent certainty.

14 Q. Can you say with any degree of certainty?

15 A. 99 percent, sir.

16 Q. And what's that based upon?

17 A. Just the fact of the technology is not there to create
18 these type of images, at this time, that I'm aware of and you
19 cannot create, you cannot create that type of image without
20 taking a picture of a real child and making it into a sexual
21 situation.

22 Q. You saw all that this technology is capable of doing with
23 images that are not even human at all, did you not?

24 A. I believe all of these were used with real images at the
25 beginning. They started off as a real image.

1 Q. Well what about Defendant's Exhibit No. 24, which is a
2 mannequin

3 A. Then that would be one exception. But however most, 90, I
4 don't know how many percent of these, but all these -- most of
5 these started with a real picture and they were changed.

6 Q. You say a real picture?

7 A. Yes.

8 Q. How do you know that the image that anybody started with
9 was the picture of a real person? How do you know that, or how
10 would anybody know that?

11 A. The technology does not exist to create fake people on the
12 internet in a picture --

13 Q. How do you know that these pictures of purported people
14 were not composites of half a dozen other body parts taken from
15 somebody else? You've seen that done here.

16 A. Then they were all from real kids. I don't, I mean, I
17 don't know what you want me to say, but that's, the technology
18 isn't there to do that yet.

19 THE COURT: Mr. Holloway, I think that what he's
20 saying is if we could direct our attention to Exhibit 22, for
21 example, and we saw the beginning of that picture of the
22 female's face, is whether even that face that was identified as
23 the starting picture that they used, whether in fact that
24 wasn't necessarily a picture that itself wasn't created from
25 other composite parts, that is a forehead and eyes, a nose and

1 a mouth?

2 THE WITNESS: Okay.

3 THE COURT: And built at that point. Now, it
4 certainly, as I understand your testimony, is that it appeared
5 from what he identified as the starting image, that it appeared
6 that the starting image was a minor?

7 THE WITNESS: Yes.

8 THE COURT: But, I guess the question is, how do you
9 know that what he identified as the starting image, in fact
10 itself wasn't built from other components, all of which could
11 have been adults.

12 A. I guess without -- I can't say a hundred percent, no.

13 Q. (By Mr. Smallwood) Well, can you say with any degree of
14 certainty on any of this in response to Judge Holmes' question,
15 any of these images?

16 A. Not with a hundred percent, no.

17 Q. Isn't it a fact that law enforcement regularly uses what's
18 known as progression software in an effort to find lost kids
19 who ostensibly disappeared at the age of 8 or 9 and they
20 attempt to advance them in age?

21 A. Yes, I've seen those.

22 Q. Does that, does that help you at all in this, in your
23 making this determination as to what's, what you can rely on
24 and what you can't?

25 A. Once again, that started with a real picture.

1 Q. Well, it may have started with a real picture, but what
2 ultimately was created?

3 A. A likeness of that child at an older age.

4 Q. But is that a real person?

5 A. No.

6 Q. Is that an actual child?

7 A. No.

8 Q. Because it's been altered, correct?

9 A. That not true, sir.

10 Q. The ultimate progression, the enhancement, computer
11 enhancement progression through say from an age of 8 to 14, the
12 14-year-old is an actual child?

13 A. No.

14 Q. It's wholly created as a result of the skill of a software
15 manipulator; is that correct?

16 A. Yes.

17 MR. SMALLWOOD: That's all I have, Your Honor.

18 THE COURT: All right, Mr. Greer, anything further,
19 sir?

20 MR. GREER: No, Your Honor. Thank you.

21 THE COURT: All right. Thank you, Mr. Holloway. I
22 appreciate your time.

23 THE WITNESS: Do you want me to leave this up here?

24 THE COURT: You can hand that back to these folks when
25 you get back down.

1 THE WITNESS: Okay.

2 THE COURT: All right. Is there anything further on
3 evidence in this regard today? Mr. Smallwood, anything further
4 on evidence, sir?

5 MR. SMALLWOOD: No, there isn't, Your Honor. Could we
6 approach the bench?

7 THE COURT: Yes, go ahead, counsel approach.

8 (Whereupon counsel approached the bench and the
9 following proceedings were had out of the hearing of open
10 court.)

11 THE COURT: Yes.

12 MR. SMALLWOOD: Your Honor, I'm a little concerned for
13 my witness' welfare based upon the rather intimidating nature
14 of the Government's questions. I'm going to ask if I might
15 inquire of these prosecutors at this point in time. May I do
16 that, Your Honor?

17 THE COURT: Sure.

18 MR. SMALLWOOD: Are you going to arrest this guy?

19 MR. GREER: No, I don't intend to arrest him.

20 MS. MORGAN: Not now.

21 MR. SMALLWOOD: Is he going to be charged?

22 THE COURT: Well, he prepared these pursuant to a
23 court order.

24 MR. GREER: He certainly did.

25 THE COURT: And second of all, their witness just

1 testified that it can't be a violation because he knew they
2 weren't minors.

3 MR. SMALLWOOD: That's correct, Your Honor.

4 THE COURT: So, now if he's --

5 MR. SMALLWOOD: I'm not worried about the ultimate
6 outcome of the case.

7 THE COURT: If he's going to distribute these, now
8 that's what I was going to be concerned about, then that's a
9 whole different matter.

10 THE WITNESS: He's not about to do that, Judge.

11 THE COURT: I'm agnostic -- of course he's not. But
12 I'm just saying I'm agnostic as to the legal position
13 articulated by Mr. Holloway at this time. That is, if the next
14 person up doesn't know then what result obtains. But we do
15 know this, and I think Mr. Greer and Ms. Morgan would concede,
16 that he -- your witness and he testified he knows it's not a
17 minor and therefore he can't be guilty of the knowing element
18 in this particular demonstration. Moreover, as I say, it was
19 prepared expressly at court order. So how else are we able to
20 delve into the constitutionality of the statute if you can't
21 look at the things necessary to test the issue. That's a
22 little bit Orwellian result, it seems to me.

23 MR. SMALLWOOD: It certainly is, Judge, but I'm very
24 concerned by the comments of Ms. Morgan saying he's not going
25 to be arrested today.

1 MS. MORGAN: You know, looking at this and seeing what
2 he's doing with kids. If it turns out that he, as the Court
3 was saying, he's distributing these in other places --

4 MR. SMALLWOOD: No not at all.

5 MS. MORGAN: -- that might give us pause, but because
6 he testified here today with this, no.

7 MR. SMALLWOOD: Okay.

8 MS. MORGAN: He was here because the Judge told him to
9 do it.

10 MR. SMALLWOOD: Okay.

11 THE COURT: All right. Does that give you --

12 MR. SMALLWOOD: I was hoping they would say this
13 Judge.

14 MS. MORGAN: We just want to make sure he doesn't go
15 out and do anything with them.

16 THE COURT: Does his hourly rate change if he gets
17 arrested?

18 MR. SMALLWOOD: Judge, I would be required to
19 represent him for free.

20 THE COURT: I know there's office time and there's
21 court time, but when it says for jail time, is that a different
22 rate? I'm betting if there is, it goes up, it doesn't go down,
23 right?

24 MR. SMALLWOOD: I want my fingerprints off of that.

25 MR. LaSORSA: Your Honor, that's one of the reasons

1 why he put that marker on the back. We were very concerned --

2 THE COURT: No, I understand that. And I mean, we're

3 going to collect these things and then you can talk to Ms.

4 Morgan and Mr. Greer about how they want to deal with the,

5 perhaps putting them in an envelope and under seal and that

6 would be the end of it and leave one there that's available for

7 any appellate questions that arise and then take care of it.

8 But yeah, I don't think -- it was a legitimate question, I

9 mean, I realize that it causes some upset, but I didn't find it

10 illegitimate questioning to pursue aspects of this and I think

11 that these distinctions between what is morphing and what is

12 modification, that is the Exhibit 29 issue, are two very

13 different things. And we'll get into that, but we don't need

14 to do that up here. But you have assurances from the United

15 States insofar as your concern and you-all can work out the

16 evidentiary parts of maintaining a record.

17 Is that sufficient from your standpoint? Does that

18 take care of any of those issues?

19 MR. SMALLWOOD: Yes. And I would like to represent to

20 the Court that this man has three young children, he's a family

21 man, I mean there's simply not going to be any problem by any

22 directive you give him about any of the items that he has

23 created.

24 THE COURT: Well, I mean, you-all can work that out.

25 I mean, that's my only directive is that counsel can work it

1 out. I mean look, we're all wrestling with the same issues. I
2 mean, Detective Holloway is in a very tough situation. He
3 knows this technology is coming. As I tried to say in my
4 order, we all know the technology is coming. How fast it's
5 coming, don't know. Is it here yet? You argue that it is,
6 they'll argue that it's not. But we know that likely some day,
7 if not today, it's not that far away where we can't possibly
8 take the position and everybody is wrestling with that. I
9 mean, where do you go from that, knowing that society has a
10 very legitimate interest in trying to regulate this kind of
11 conduct and do it in a way that at the same time doesn't cause
12 problems. But that's what we're going to do in the argument
13 section, so that's previews of coming attractions. All right.

14 MR. LaSORSA: If the Court please, would the Court
15 give us some direction as to what the witness should do with
16 the images that are identical to that exhibit that he has in
17 his computer. Now, he has downloaded those images, along with
18 all the other exhibits on to three disks, one for the Court,
19 one for counsel for the Government and one for our file. But
20 I'm --

21 MR. SMALLWOOD: They are still on his hard drive.

22 MR. LaSORSA: They are still -- and some direction
23 from you may be appropriate with respect to, I mean we --

24 THE COURT: I would download them on to a disk and
25 purge them from the hard drive and leave them here on disk with

1 the Court.

2 MR. SMALLWOOD: Would Your Honor care to admonishment
3 to him from the bench?

4 THE COURT: All right. That will be fine. Does that
5 make sense to you? All right.

6 (Whereupon counsel returned to their respective places
7 and the following proceedings were had within the presence and
8 hearing of open court.)

9 THE COURT: All right. Let's turn our attention to
10 the disposition of the exhibits. It would appear that the best
11 thing to do is for counsel to work out some matters that would
12 be put on disks, as well as the visuals put into a sealed
13 envelope and would remain under seal here. With respect to
14 anything left on the hard drive, I would direct that that
15 simply be purged from your hard drive once we have effected a
16 record that will remain here and then purge that from your hard
17 drive and then we will proceed on that basis.

18 Anything else on this issue that we need to talk about
19 for purposes of the handling of the exhibits here?

20 MR. SMALLWOOD: I don't believe so, Your Honor, as
21 long as we might have access to the Court if we reach a -- get
22 loggerhead about something. I think we can --

23 THE COURT: All right. I don't anticipate there will
24 be any problem in that regard. As I say, everybody has the
25 same interest here which is to develop a fact record that can

1 properly address these issues and in order to develop such a
2 fact record and to comply with the Court's order that such fact
3 record be developed on Marchand and its progeny, it's necessary
4 to create the very images that one might otherwise argue
5 constitutes a statutory violation. So the Court so ordered
6 that, we now have it. It's a little bit like the dog chasing
7 the truck, what's he going to do with it when he gets it. But
8 here it is, so you-all will take care of that evidentiary
9 issue. Does that work for the United States, Mr. Greer, Ms.
10 Morgan?

11 MR. GREER: Yes, Your Honor.

12 THE COURT: All right, does that work for you, Mr.
13 Smallwood?

14 MR. SMALLWOOD: Yes, it does.

15 THE COURT: All right, now, let's turn our attention,
16 if we could bring up the podium.

17 Ms. Holland, if you could provide this back to counsel
18 and that will be part of the retained and then here is the
19 other.

20 MR. BOLAND: May I grab the computer?

21 THE COURT: Yes, go right ahead.

22 All right, Mr. Smallwood, you are recognized, sir.

23 MR. SMALLWOOD: Your Honor, I'll be brief because I
24 think the Court has read all of the written information and has
25 heard argument on this before. I think it's clear as far as

1 our argument about the constitutionality of the statute, that
2 the statute does not explain how anyone is able to distinguish
3 between digital images that are proscribed and those that are
4 protected. That is the vagueness inherent in this statute,
5 coupled with the technological evidence which this Court has
6 seen, which I trust this Court to find to be compelling. What
7 is significant about --

8 THE COURT: Now, you appreciate the concern vagueness
9 contemplates that the statute is void as a matter of law on its
10 face, right?

11 MR. SMALLWOOD: We don't contend that, Your Honor.

12 THE COURT: I understand that. So how do you -- but
13 that's what a challenge for vagueness, is that a statute
14 doesn't put at citizen on notice and, therefore, on its face
15 can't be applied, right?

16 MR. SMALLWOOD: It cannot be applied to anyone who was
17 not a creator of images that are viewed on the internet that
18 convey the idea or image of what might be a minor child.
19 Unless you were the creator of that image or had some sort of
20 independent knowledge of the specific identity and age of the
21 child involved, that statute is vague, because you cannot
22 conform your conduct. Detective Holloway, when pinned down,
23 indicated that his advice to his friends, and to be quite frank
24 with you, Judge, my advice to my friends would be chill your
25 First Amendment rights when this stuff pops up, because you

1 can't know if you're exercising your First Amendment rights
2 under Ashcroft, or you're violating 2254. That is a classic
3 definition of a statute that is chilling a person's exercise of
4 their First Amendment rights. Ashcroft did not have -- the
5 Supreme Court nor the lower courts in the Ashcroft case did not
6 have benefit of the evidentiary presentation this Court has. I
7 don't believe Marchand had. I know Kimler didn't. I don't
8 know of any witness who has testified to these types of images
9 and how they can be altered and how no one can have
10 knowledge of or reliability about what you're seeing, other
11 than this witness in this case and a few other cases that he
12 has testified in.

13 It likewise is overbroad based on the application of
14 this technological evidence to this statute because it clearly
15 loops in under Ashcroft the exercise of your constitutional
16 rights to expression and speech to view virtual child
17 pornography as defined by Ashcroft, while at the same time
18 appropriately prohibiting conduct involving the actual use of
19 minor children in explicit sexual conduct. Those are classic
20 cases and this presents a classic case of an overbroad
21 statute -- I mean, of a vague statute as well as an overbroad
22 statute. There has been no rebuttal to any of the testimony by
23 Mr. Boland that there exists no way that anyone, who was not
24 the creator of the image, can ascertain what they are looking
25 at and whether they're looking at an actual child or a virtual

1 child. If there was any rebuttal evidence of the power of the
2 money of the United States Government, I can assure you, they
3 have had plenty of notice for this hearing, Judge, we would
4 have heard someone. So what you saw today is cutting edge
5 technology gone totally un rebutted.

6 I believe we have addressed the considerations in the
7 Marchand case, Judge. Once again, that case did not involve
8 any testimony similar to what the Court has heard today. It's
9 my understanding that that argument was basically made by a
10 lawyer on behalf of his client with no evidentiary basis to
11 back it up, which we certainly have here. I believe the
12 technology in Marchand was the POSER technology or is described
13 as POSER technology, which both Mr. Boland and Detective
14 Holloway agree is nowhere near the state-of-the-art that
15 Photoshop technology is. So I think in the considerations and
16 the concerns that Marchand, that the judge in Marchand
17 indicated, could be an example of how a person might have
18 knowledge, I think, were totally dealt with here in a fashion
19 that makes Marchand inapplicable to the evidence that was
20 presented to this Court. This Court has seen how easily an
21 image can be created that appears to be a photograph with a
22 staple in it or a paperclip, which we would indicate or perhaps
23 give some kind of an indication that this was a photograph or
24 was an older photograph, that wasn't a photograph at all that
25 the Court saw. It was, I think that was Exhibit No. 32. That

1 was totally created by the technology, which is readily
2 available, it costs 650 bucks, it's given away with certain
3 hard, hard computer purchases that you can make.

4 The exhibits that we presented to the Court dealt with
5 the fact that while this may be the latest version of this
6 particular hardware, it's been around for over 10 years. It
7 was clearly available in much the same fashion in the summer
8 and fall of 2002, which are the critical dates in this
9 Indictment. And if anything, Your Honor, although there hasn't
10 been anything about this, I think the Court might be able to
11 determine from some of the context of the indictment that Mr.
12 Shreck has a certain amount of technological expertise with
13 regard to computers. If anything, that militates in favor of
14 our argument, any knowledge that he might have about how easy
15 manipulatable these images are, would cause him to have greater
16 doubt about what he was watching, rather than lack of doubt.
17 There's no question in my mind that if my 85-year-old mother
18 saw some of these images, after she got through taking care of
19 me for showing them to her, there would be no doubt in her mind
20 that she had been seeing minor children engaged in sexual
21 conduct, when in fact we all know that that simply wasn't the
22 case.

23 And I think what's critical about Detective Holloway
24 answering the Court's better articulated questions than mine,
25 there is no way that anyone, even an individual such as

1 Detective Holloway, who is greatly deposed to eradicating child
2 pornography and would like to be able to tell this Court that
3 he can ascertain real from visual images, is not able to do so.
4 Nobody is able to do so. It's un rebuttable.

5 The Court has not -- or the Government, pursuant to
6 the questions from the Court and me, has failed to present any
7 evidence to this Court, in my opinion, that Mr. Shreck had any
8 way to know what he was viewing involved the use of real
9 children as opposed to virtual children. The testimony is
10 clear based upon the disclaimers by the Government, both in the
11 exhibits presented hear, as well as the testimony from Mr.
12 Boland, that you simply cannot trust what you read or see on
13 the internet as giving you an accurate description of anything.

14 And I would take issue with the statement in Ashcroft,
15 despite the Supreme Court asserting it to the contrary, the
16 statement that is contained in Ashcroft that if this in fact
17 were the state of facts when Ashcroft was determined, that the
18 virtual creators of nonreal children pornography would run out
19 the real stuff. Judge, that's just not so. It's just exactly
20 the opposite. It is precisely what Mr. Boland indicated to
21 you. If I want to make some money while not violating the law,
22 what do I do as far as child pornography is concerned?
23 Obviously, I do not use real children, I create whatever I can
24 create using without exploiting children. But do I tout it or
25 do I market it as that? Of course not. These people know the

1 mind set of the people who seek these things out. It's going
2 to be always touted as involving real children and yet if they
3 get decent legal advice they'll never use real children,
4 they'll be able to market this stuff to the people who want to
5 look at the stuff, claiming it's real, while at the same time
6 being protected under the Ashcroft decision because they are
7 not using children in sexually exploitative manners.

8 Thank you.

9 THE COURT: All right, Mr. Greer, you are recognized,
10 sir.

11 MR. GREER: Thank you, Your Honor.

12 Your Honor, very briefly. In my determination, based
13 on the prior research I've done and the testimony today that we
14 have heard, my understanding is that in determining whether a
15 law facially overbroad or vague, Your Honor's first task is to
16 determine whether that enactment reaches a substantial amount
17 of constitutionally protected conduct, and I would submit that
18 based on the evidence we heard today, even giving the benefit
19 of the doubt to defense counsel and their expert, that the
20 conduct that is reached by the testimony from Mr. Dean Boland
21 is so minimal that it would not reach a substantial amount of
22 constitutionally protected conduct, that being specifically
23 that there are so few people that could afford this type of
24 technology combined with the skill required for this type of
25 technology, at the present time, compared to the education that

1 would be not a necessity, but an advantage for this type of
2 technology and the relative ease of using a real child instead
3 of going through the task of using these other, this other more
4 expensive route of virtual child pornography. I think that
5 that family of offenders --

6 THE COURT: What is the expense that you see as being
7 occasioned? I mean, I understand the expertise issue, but what
8 is the expense issue that you're...

9 MR. GREER: Your Honor, my understanding was that the
10 latest addition of Adobe was between two and \$3,000 priced, I
11 may be wrong on that, but that was my understanding. And I
12 just think that that's prohibitive for someone that's in the
13 business of actually using real children, such that they would
14 not see a need to buy that technology, to gain the skill, to go
15 to school to get any education that would be helpful for that
16 purpose and trouble of manufacturing virtual child pornography
17 so as to violate the statute. And if that has occurred, that
18 that conduct has reached such a small amount of people that I
19 don't believe it reaches the threshold finding for being
20 facially overbroad.

21 And Your Honor, further, in regards to the vagueness
22 issue. Whether it is facially vague or not, the Court, I
23 believe, is to assume that the enactment or the statute
24 implicates no constitutional -- if the statute implicates no
25 constitutionally protected conduct, it should uphold the

1 challenge only if the enactment is impermissibly vague in all
2 of its applications. Well, even counsel for defense agrees
3 that it is not vague of one who manufactures, actually
4 manufactures child pornography. The Government would expand
5 that definition to people who believe that they are viewing
6 real child pornography and actually turned out, and subsequent
7 analysis shows that that is real child pornography. So
8 certainly --

9 THE COURT: Isn't that the cornerstone of your legal
10 argument? That is to say, as testified by Detective Holloway,
11 that an image that we all know to be a virtual child can
12 violate the statute because the defendant wrongfully believes
13 it to be a real child, right.

14 MR. GREER: Well --

15

16 THE COURT: Is that a position, which was articulated
17 by the witness, but is that a position the United States
18 adheres to?

19 MR. GREER: No, Your Honor, because I believe that the
20 statute -- well the current statute, even now, I think,
21 incorporates computer generated images that are
22 indistinguishable from actual images. So I believe that the
23 legislature has, since the impending technology, and has
24 attempted to address it in the most recent version --

25 THE COURT: But that's not this case.

1 MR. GREER: Correct, Your Honor.

2 THE COURT: All right.

3 MR. GREER: Correct, Your Honor. But I believe that
4 in regards to this case, there must be an actual minor
5 identified -- an actual minor not necessarily identified, that
6 is or appears to be engaging in sexually explicit conduct. And
7 that can be accomplished through morphing, or through an actual
8 photograph, or through an actual digital photograph taken.
9 Several means.

10 THE COURT: But we're not talking about -- I mean, I
11 understand the morphing argument, but I'm focused in particular
12 on Exhibit 29 and other of the exhibits in which the
13 demonstration was made of actually reducing the apparent age of
14 the subject. That's not morphing, right? You would agree with
15 that?

16 MR. GREER: Yes, Your Honor, I would agree that that
17 is --

18 THE COURT: I mean, I understand the notion of sort of
19 cut and paste of morphing. This is taking the same person and
20 reducing hip size and so forth to make them appear to be a
21 minor. Now, if you start with an adult and then the appearance
22 of being a minor is achieved through the means that we saw
23 today, and then somebody possesses that image believing it to
24 be a minor, has that person violated the statute?

25 MR. GREER: I don't believe under the law at the time

1 relevant here, that that would be true, that that person would
2 be violating the law. I don't think that would be accurate.

3 THE COURT: Even though they believed, absolutely,
4 that it was a minor.

5 MR. GREER: They can believe to their hearts content,
6 but the fact is if it's not an actual minor under that statute
7 at the time, then I don't believe it's violative of the
8 statute.

9 THE COURT: Okay. Now, how do you prove -- which the
10 Court is, that's the position of the United States that is
11 different than what Detective Holloway testified to, right?

12 MR. GREER: Yes, sir.

13 THE COURT: I'm not trying to have you throw him out
14 of the sled, but he's out now. Well, in this case, how is it
15 that you intend to prove knowledge as opposed to belief?

16 MR. GREER: Your Honor, in this case, we would intend
17 to prove knowledge through the defendant's, first his admission
18 that he downloaded child pornography, as one element. Another
19 element or factor would be the--

20 THE COURT: Did he know it at the time to be child
21 pornography?

22 MR. GREER: That's what we -- that's what we assume
23 from the statement, "I downloaded child pornography."

24 THE COURT: But if he doesn't know where the creation
25 of the image was from, can he know that?

1 MR. GREER: I think he can have reason to know that
2 and I think that would be a fair definition of whether he
3 knowingly violated that statute. I think that if he --

4 THE COURT: How would he know if neither Detective
5 Holloway, nor the expert witness could know. You would agree
6 that with respect to Exhibit 29, you couldn't know either?

7 MR. GREER: I would agree with that. But Detective
8 Holloway and the Court and counsel are looking at these
9 photographs in a vacuum. Looking at the facts of Mr. Shreck's
10 case, we're looking at a series of images taken from the hard
11 drive or from the computer equipment of Mr. Shreck, which that
12 element in and of itself is difficult to achieve a consistent
13 picture that appears real. So we have that element.

14 THE COURT: But how does he know? I mean, there's no
15 question, or at least for purposes of this discussion, it would
16 be assumed arguendo, that there was an intent and desire to
17 download child pornography, right? I mean that's -- and that's
18 why I say I'm accepting that for purposes of discussion only.
19 But for purposes of discussion, the intent exists. All right?
20 Now, at the expense of relying on old law school hypotheticals,
21 you go to the hospital to kill somebody, you go to their room
22 in the hospital and you shoot them in the head. You find out
23 later they actually died an hour earlier, right? Can you
24 charged with murder?

25 MR. GREER: No.

1 THE COURT: Can you be charged with attempted murder?

2 MR. GREER: Good question.

3 THE COURT: You missed that hypothetical in law
4 school.

5 Absolutely, all of the elements are perfect of
6 attempting to murder that person, notwithstanding. There's no
7 elements that requires they be alive at the time. That's this
8 case, that is to say, if there is, not this case meaning this
9 defendant specifically, but this case for purposes of making
10 some determination about the statute, and that is a case in
11 which one assumes that there was an intent and desire to
12 download child pornography. That doesn't change the fact that
13 one of the elements is you knew, right?

14 MR. GREER: Yes, sir.

15 THE COURT: This it was child pornography. So those
16 things that might be probative of your desire, that is your
17 motive, your interest, your hope that you were getting child
18 pornography, that doesn't -- not probative of the question of
19 whether you knew it, if it's unknowable, right? If it's
20 unknowable.

21 And that's what this evidentiary proceeding is, is to
22 determine whether it is knowable, objectively knowable that
23 when you take down those images from a defendant's collection,
24 whether it is objectively knowable and therefore subject to
25 proof beyond a reasonable doubt that this was a minor, right?

1 Now based on this presentation, is it an objectively
2 knowable fact, distinct from what the desire was, what the
3 belief was, what the hope was. Certainly, if intent to possess
4 child pornography were the crime, then those are all probative
5 of that question. But then that's different than the question
6 of whether he knew or could know. And as Ms. Morgan noted in
7 the last proceeding, there's serious problems if it is
8 determined that it is not knowable facts, right?

9 MR. GREER: Yes, Your Honor.

10 THE COURT: I mean there's serious prosecution
11 problems and that's why we went to the old instructions. And
12 it's not to say these will be the instructions, that'll be
13 something we will all work out together, but we brought out old
14 instructions in a case that the U.S. Attorney was involved in
15 for the purpose of testing whether under these instructions the
16 United States can prove beyond a reasonable doubt the elements
17 of the offense.

18 So how is it that you would prove the elements of the
19 offense under these circumstances. That is, that such visual
20 depictions were of minors, right, the defendant knowingly, that
21 the productions were of minors engaged in sexually explicit
22 conduct?

23 MR. GREER: Excuse me, Your Honor.

24 THE COURT: All right.

25 MR. GREER: I'll address --

1 THE COURT: And that the defendant knew, as that term
2 is defined later in these instructions, that at least one of
3 the performers in such visual depiction was a minor engaged in
4 sexually explicit conduct, right?

5 MR. GREER: And I think the only way to --

6 THE COURT: He just hoped it, right?

7 MR. GREER: Well, I think the only way to-- for that
8 offense to be provable by the United States would be to define
9 knowingly and knew in terms of the defendant must have had
10 knowledge or reason to know. Because I think reason to know
11 opens the door to the factors in Marchand of whether a series
12 of photographs were downloaded, the number of web sites
13 visited --

14 THE COURT: Well, that certainly goes to his desire,
15 right, that it be child pornography, right? How does that go
16 to the question of whether he knew, had actual knowledge,
17 right?

18 MR. GREER: If there --

19 THE COURT: The knowledge that the visual depictions
20 were in fact of minors engaged in sexually explicit conduct.
21 If he -- would you agree that if he possessed Exhibit 29 that
22 he could not be charged?

23 MR. GREER: I would agree.

24 THE COURT: All right. Because you can't know that
25 that's a minor and in fact we happen to know it's not a minor.

1 MR. GREER: Correct.

2 THE COURT: Right?

3 MR. GREER: Yes, sir.

4 THE COURT: So if he can't be charged for 29, then if
5 he doesn't have actual knowledge of the minor involved in the
6 tape, or the picture, I mean. It's just photographs, right?

7 MR. GREER: Just digital images.

8 THE COURT: Just digital images.

9 MR. GREER: And -- well, yes, sir.

10 THE COURT: All right. So he's charged with digital
11 images. If he can't know, if it's not knowable that the image
12 on the digital image is a minor, how can he know something
13 that's not knowable?

14 MR. GREER: I don't think he can know something that's
15 not knowable, but I think it is knowable in the fact that he
16 would have reason to know, based on the factors in Marchand. I
17 don't mean to repeat myself, Your Honor, but based on -- that
18 would be my argument, is based on the factors in Marchand, they
19 don't go to necessarily his desire, but his knowing, his
20 knowing behavior up to that point and throughout the dates of
21 the alleged offense.

22 Also, the fact that there are known victims, I think
23 is relevant to his knowledge if those are sites that he has
24 gone to consistently. I think that could be a factor for the
25 Court to consider if that were to come into evidence. And

1 also, I think his statement is not the only piece of evidence
2 and could survive if it was the only piece of evidence, but I
3 think it is probative as to what he had reason or knowledge to
4 know at the time and I think that should be the definition of
5 knowingly in regards to this case.

6 THE COURT: Is it your intention to put on expert
7 testimony in connection with establishing the knowing element
8 here?

9 MR. GREER: Your Honor, I believe the only form of
10 expert testimony we would intend to produce would be an
11 individual who would have compared the Innocent Images images
12 from their database with the actual images that were downloaded
13 on Mr. Shreck's computer in making a determination as to
14 whether or not they had been altered in any form or fashion.
15 And I think that goes to authentication.

16 So, I don't know that we would have any expert
17 testimony on the front end as to the defendant's intent other
18 than the circumstantial evidence that would come out through
19 Detective Holloway and Detective Beatty.

20 THE COURT: Let me ask this, as an aside matter.
21 Marchand states "The Government may prove that a person acted
22 knowingly by proving beyond a reasonable doubt that that person
23 deliberately closed his eyes to what otherwise would have been
24 obvious to him. One cannot avoid responsibility for an offense
25 by deliberately ignoring what is obvious."

1 Is it, based on the evidence adduced today, is it
2 obvious that an image that apparently looks like a minor is a
3 minor and you're turning a blind eye by not -- and if not, what
4 inquiry could you possibly do with respect to that image, if
5 you couldn't communicate with the creator of the image. And
6 even then, are you satisfied that the creator of the image
7 didn't take an image that itself was created upstream, right?

8 MR. GREER: Your Honor --

9 THE COURT: I mean, we don't know. We learned today,
10 I'm sure you-all know it, I don't know it, that there are web
11 sites where aspiring parents put their children up wearing
12 bikinis. We don't know if that aspiration doesn't mean that
13 they're not, they themselves aren't doctoring the photographs
14 because their goal is to secure some financial gain from having
15 this child receive some kind of a contract as a model, right?

16 MR. GREER: Yes, Your Honor.

17 THE COURT: Temptation is great, right? And so they
18 commence some doctoring themselves, so that when somebody with
19 evil in their heart takes that image and uses it as part of a
20 sexually explicit presentation, they are actually using a
21 doctored image in the first place, right?

22 MR. GREER: Yes, sir.

23 THE COURT: Which may or may not be a child, right?

24 MR. GREER: Yes, sir.

25 THE COURT: So even in that case, you find the person

1 who put the image of the person, the image from the person in
2 the model site into a sexually explicit situation, you find
3 that person, he or she confesses that that's what he or she
4 did, we're still not satisfied, nor have we established beyond
5 a reasonable doubt, that the person who put that image on there
6 didn't create it from composites upstream, right? And yet the
7 person who now has it in their possession is supposed to know
8 that that's an actual minor, right?

9 MR. GREER: Not as to one image, no. I don't agree
10 with that. I think, yes, they should know as to hundreds of
11 images including a vid -- I forgot to mention possible 404(b)
12 evidence as to a videotape of an actual person, a relative of
13 the defendant's that was obtained -- excuse me, manufactured by
14 the defendant. Also a video, MPEG video I did not mention in
15 my have argument that was found on the defendant's computer
16 with -- entitled daddy and a 6-year-old, or something that
17 would seem to say to a normal individual, reasonable person,
18 that this might be child pornography especially when that movie
19 is watched and it appears to show --

20 THE COURT: Is the video the subject of the
21 Indictment?

22 MR. GREER: No, Your Honor, just potential 404(b)
23 evidence.

24 THE COURT: Does the video include a character who is
25 on one of the photographs? That is, for purposes of

1 identifying --

2 MR. GREER: I --

3

4 THE COURT: It's just a video?

5 MR. GREER: Yes, sir. I don't believe it is -- it is

6 not of an identifiable minor as far as we know, Your Honor, no.

7 Or of a minor in a digital image in the indictment.

8 THE COURT: And you didn't charge the video?

9 MR. GREER: No, Your Honor.

10 THE COURT: Now. That video is not the video that's
11 been viewed by the Court, this is other videos?

12 MR. GREER: Right, this--

13 MR. SMALLWOOD: I don't believe it is, Your Honor.

14 THE COURT: All right.

15 MR. GREER: It is not. This is just a downloaded
16 video on the defendant's computer, unrelated to the videotape
17 that was earlier talked about involving the granddaughter.

18 THE COURT: But would you agree that the notion here
19 of something that would have been obvious, that is the turning
20 the blind eye exception, that if in fact it's not knowable,
21 then it can't be obvious, right?

22 MR. GREER: Hypothetically, if it's not knowable it
23 can't be obvious, but I think in this case --

24 THE COURT: Right. And of course the judge in that
25 case believed it to be knowable --

1 MR. GREER: Yes.

2 THE COURT -- and therefore could form the basis of a
3 claim that the defendant turned a blind eye. And so we circle
4 back to this fundamental fact question as to whether or not
5 it's knowable, right?

6 MR. GREER: I agree, yes, Your Honor.

7 THE COURT: All right. What else, anything further
8 from the United States, Mr. Greer?

9 MR. GREER: If I could just have one moment, please?

10 THE COURT: Sure.

11 MR. GREER: No, Your Honor, thank you.

12 THE COURT: All right.

13 Mr. Smallwood, anything further, sir?

14 MR. SMALLWOOD: No, sir, not unless the Court has a
15 question.

16 THE COURT: All right. I think that the order that
17 the Court entered describes the fundamental problem that we
18 have, and we had some colloquy with Ms. Morgan at the last
19 proceeding about it which is what caused us to go back and
20 review the instructions. I'm trying to fully appreciate what
21 it is that the United States would adduce at trial by which to
22 prove these elements of the offense charged. Let me ask at the
23 outset, Mr. Greer, and particularly, Ms. Morgan, because this
24 was your case, was it not, Ms. Morgan?

25 MS. MORGAN: It was.

1 THE COURT: Is there any evolution in the law -- and
2 I'm not trying to hold you to this for purposes of trial, but
3 at least as of this point today, that would cause us
4 specifically not to use these instructions? I mean, they're
5 not particularly exotic instructions, but the essential
6 elements of the offense charged and the knowingly and knew
7 defined and the proof of knowledge defined.

8 MS. MORGAN: I'm not aware of anything that would
9 change the instructions that the Court gave previously. In
10 fact I had planned when we were submitting our requested
11 instructions to have the Wollet instructions included.

12 THE COURT: As the instructions. Okay.

13 MS. MORGAN: So in answer to your question, no, I'm
14 not aware of any changes in the law that would cause them to be
15 different.

16 THE COURT: All right, because what I would like to do
17 is I would like to fully understand in the context of the
18 evidentiary hearing and the record as it currently stands, in
19 light of that, I would like to appreciate with particularity
20 what it is that would be adduced at trial that would establish
21 these elements of the offense, and that is in particular that
22 the defendant knew. I understand the intention of the United
23 States is that you believe that you'll have evidence that will
24 demonstrate that in fact these are actual minors, is that
25 right, sir?

1 MR. GREER: Yes, Your Honor.

2 THE COURT: All right. So we're assuming again,
3 arguendo, certain things, but in light of the evidentiary
4 presentation today, what evidence would be adduced at trial
5 that the defendant knew that at least one of the performers in
6 such visual depiction was a minor engaged in sexually explicit
7 conduct? Because it may be that the evidence is appropriately
8 offered and received for purposes of that knowledge.
9 Alternatively, it may be that while the evidence identified and
10 proposed by the United States is admissible, it is not
11 necessarily probative of that specific element. That is, there
12 is a distinction between the desire and hope of downloading
13 child pornography and actually what would go to the question of
14 knew that it was child pornography and how is that established.
15 As I understand it, you're not having expert testimony in that
16 regard.

17 So what I would like to do is in two weeks time to
18 receive from the United States a particularized description of
19 the -- And what is two weeks from tomorrow, Ms. Holland?

20 THE CLERK: That would be April the 30th.

21 THE COURT: April the 30th. And then ten days after
22 that would be?

23 THE CLERK: That would May the 10th.

24 THE COURT: May the 10th. And by May the 10th, the
25 defendant can respond to the detailed description of what

1 evidence would be adduced for purposes of knowing and under the
2 instructions that were set out in the April 12th order, and
3 then we will set this matter down for a hearing.

4 This is the same issue, but it's now down to the
5 fundamental facts of is this something that can be proved in
6 light of the evidence that was adduced today.

7 I continue to have some hesitation as viewing this as
8 matters of overbreadth or vagueness, except to the extent
9 articulated that it is vague as to anybody who didn't actually
10 prepare the image himself or herself using a real child. That
11 peg may go in that hole, but I'm having some real trouble
12 seeing it as vagueness or overbreadth. I guess I continue to
13 see it more as described by Ms. Morgan who has done more of
14 these cases than anyone I know, that if you simply take the
15 knowing element out of it, it becomes unprovable because you
16 can't prove that someone knows something that is unknowable.
17 They may want to. That may be their hope and dream, but if
18 they can't possibly know it, then they can't be proved to have
19 known it.

20 So but I think, you know, I'll give further
21 consideration to the vagueness and overbreadth as articulated
22 here and in light of these proceedings and you can, if you wish
23 to submit further authorities in that regard, we would do so by
24 the same dates, based on the evidence today. But in
25 particular, by those dates I want to see what it is and how it

1 is that the United States would undertake to prove that
2 something is knowable or that was known under these
3 instructions and have the defendant have the opportunity to
4 respond to it, because if the statute is ultimately going to
5 fail some day, as Detective Holloway anticipates, I guess, is
6 fair to say, that some day it will fail because some day
7 absolutely it will be unknowable, under the technology, but I
8 tend to believe that if some day, whether that's here or not, I
9 don't know, but if some day it is to fail, it will become
10 impossible to apply because people can't know it. That's when
11 it fails.

12 Now, I understand other questions of concern about the
13 chilling effect under the First Amendment, but that, to me, is
14 directly related to this notion of notice of conduct and the
15 knowing element. You are supposed to know what is criminal
16 conduct. That's why it's an element of the offense. If you
17 can't know it, then you can't be charged with having known it
18 and incarcerated.

19 So we will do it by those dates. We'll set the matter
20 down for a hearing in the middle of May.

21 Ms. Holland, do you have the --

22 MR. SMALLWOOD: Your Honor, in that regard I'm going
23 to be out of town the 10th through the 21st of May. If we
24 could just set it sometime other than those.

25 THE COURT: All right. Do we have something after

1 that time?

2 THE CLERK: Friday, May the 28th at 9:00.

3 MR. SMALLWOOD: That will be fine, Judge.

4 THE COURT: Friday, May the 28th at 9:00 o'clock, does

5 that work? Let me see what...

6 Let me ask you if we can move that up to Tuesday the

7 25th? Is that workable for you-all --

8 MR. GREER: Yes, sir.

9 THE COURT: -- at 3:00 o'clock on that day?

10 MR. SMALLWOOD: Yes, sir.

11 THE COURT: Mr. Greer, Ms. Morgan, does that work for

12 you-all?

13 MR. GREER: Yes, Your Honor.

14 THE COURT: Okay. We'll put it down for that time,

15 for Tuesday the 25th at 3:00 o'clock. And as I say, any

16 additional authorities that we have, and I do very much

17 appreciate the submission by the United States of the United

18 States vs. Marchand case, it certainly was very helpful in

19 preparing for these proceedings today.

20 All right, anything further today on behalf of the

21 United States, Mr. Greer?

22 MR. GREER: No, Your Honor, thank you.

23 THE COURT: Anything further today, Mr. Smallwood?

24 MR. SMALLWOOD: No, Your Honor. Do I understand

25 correctly that the 25th is argument only, you do not anticipate

1 any evidence?

2 THE COURT: If from the papers it appears that we need
3 to do something else, then we will either so direct or we'll
4 have a phone conference and talk about where we are as a
5 result.

6 MR. SMALLWOOD: We don't anticipate putting on any
7 evidence, obviously.

8 THE COURT: I'm anticipating proceeding, and I would
9 like Mr. Greer to sit down with you so that it can be presented
10 in a way that makes perfect sense, that is, how they intend to
11 prove it. And it's basically accepting a proffer for these
12 purposes, again, accepting a proffer of what they intend to
13 demonstrate beyond a reasonable doubt at trial to establish
14 that element. And we're not -- I'm not intending to, at this
15 stage, challenge whether or not it will be convincing in that
16 regard, but rather to identify what witness will say what for
17 what purpose to demonstrate that they know. And I think that
18 it might really be in everyone's best interest, if once you
19 have finished that, even before you put that in the papers, to
20 review it with counsel.

21 I'm trying to prepare a record that everybody at least
22 as a fact matter would agree upon would be the case and at
23 least we can agree on what the parties do agree on and we can
24 agree on what the parties don't agree on, but at least everyone
25 is clear about where the points of divergence are and where the

1 points of agreement are. All right, does that make sense?

2 MR. SMALLWOOD: Yes, sir.

3 MR. GREER: Yes, sir.

4 THE COURT: All right. Anything further, Mr. Greer?

5 MR. GREER: No, Your Honor.

6 THE COURT: Anything further, Mr. Smallwood?

7 MR. SMALLWOOD: No, sir.

8 THE COURT: All right. We'll be adjourned.

9 (Recess).

10

11 A TRUE AND CORRECT TRANSCRIPT.

12

13 CERTIFIED: _____
14 Glen R. Dorrough
United States Court Reporter

15

16

17

18

19

20

21

22

23

24

25